1715.

# SUPREME COURT OF THE UNITED STATES.

## No. 165.

DICKERSON B. MOREHOUSE, PL'FF IN ER.,

vs.

WILLIAM A. PHELPS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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At a supreme court begun and held at Ottawa, on Tuesday, the twenty-first day of April, in the year of our Lord one thousand eight hundred and fifty-seven, within and for the third grand division of the State of Illinois—

Present, the honorable Walter B. Scates, chief justice; the honorable John D. Caton, associate justice; the honorable O. C. Skinner, associate justice; Lorenzo Leland, clerk; Eri L. Waterman, sheriff; Washington Bushnell, attorney.

DICKENSON B. MOREHOUSE
vs.
WILLIAM A. PHELPS.
} Appeal from Jo Daviess.

Be it remembered that heretofore, to wit, on the eighteenth day of April, A. D. 1857, the above-named appellant by his attorney filed in the clerk's office of said supreme court a transcript of the record and proceedings of a plea which was in the circuit court of Jo Daviess county, State of Illinois; which said transcript is in the words and figures following, to wit:

STATE OF ILLINOIS,
*Fourteenth Judicial Circuit, Jo Daviess County.*

Pleas in the circuit court begun and held within and for the county of Jo Daviess aforesaid on the third Monday of the month of October, A. D. 1856, before the judge of said fourteenth judicial circuit, to wit: the honorable Benjamin R. Sheldon; George M. Mitchell, esq., clerk; Wm. R. Rowley, sheriff.

WILLIAM A. PHELPS
vs.
BRADNER SMITH.
} Ejectment.

Be it remembered that heretofore, to wit, on the 29th day of November, A. D. 1851, the said above-named plaintiff by his attorney filed in the clerk's office of the circuit court in and for the county and State aforesaid, a bond for costs, together with a declaration and notice in ejectment; which said bond for costs is in the words and figures following, to wit:

STATE OF ILLINOIS,
*Jo Daviess County, sct.*

In the Jo Daviess county circuit court, Nov. term, 1851.

WILLIAM A. PHELPS, Plaintiff,
*vs.*
BRADNER SMITH, Defendant.
} In ejectment.

I do hereby enter myself security for costs in this cause, and

acknowledge myself bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite party, or to any of the officers of this court, in pursuance of the laws of this State.

Dated at Galena this 29th day of Dec., A. D. 1851.

J. B. STEVENS, [L. S.]

Approved.

WM. H. BRADLEY,
*Clerk of Jo Daviess County Circuit Court.*

Endorsed: "Filed Nov. 29, 1851." Wm. H. Bradley, clerk.

The declaration and notice is in the words and figures following, to wit:

STATE OF ILLINOIS,
*Jo Daviess County.*

In circuit court of said county, Nov. term, 1851.

William A. Phelps, the plaintiff in this suit, complains of Bradner Smith, the defendant in this suit, in a plea of trespass and ejectment; for that whereas heretofore, to wit, on the first day of October, A. D. 1851, at the county aforesaid, the said plaintiff was possessed in his own right in fee of the following described premises, to wit: the undivided half of lot No. nine, (9,) and the undivided half of lot No. eight, (8,) said lot eight fronting forty-seven (47) feet, more or less, on said Water street, and running westwardly fifty-eight by sixty-nine feet, (58 by 69,) containing 0.67 of an acre, more or less, known and designated on the plat of the late town, now city of Galena, said premises being situated in said county and State aforesaid; and the said defendant afterwards, to wit, on the day and year aforesaid, to wit, at the county aforesaid, while the said plaintiff was so possessed of said premises as aforesaid, entered into the same and possessed himself of said premises unlawfully, and still withholds the same from the said plaintiff unlawfully and wrongfully.

Nol. pros. as to this count.

And whereas also the said plaintiff heretofore, to wit, on the first day of October, A. D. 1851, at the county aforesaid, was possessed in his own right in fee of the following described premises, situated in the city of Galena, county and State aforesaid, to wit, lot No. seven, (7,) said lot seven fronting forty-seven (47) feet, more or less, on Water street, and running westwardly seventy-nine by eighty-nine (79 by 89) feet, containing .09 of an acre, more or less, as known and designated on the plat of the late town,

now city of Galena; and the said plaintiff being so possessed thereof, the said defendant afterwards, to wit, on the day and year last aforesaid, to wit, at the county aforesaid, entered into the said last described premises, and unlawfully withholds from the said plaintiff the possession thereof to the damage of the said plaintiff of five hundred dollars, ($500,) and therefore he sues, &c.

J. P. STEVENS,
*Att'y for Plff.*

To Bradner Smith, the above-named defendant.

You are hereby notified that the above declaration in ejectment will be filed in the circuit court of Jo Daviess county, State of Illinois, on the 29th day of November inst. of the present term of said court; that upon filing the same, a rule will be entered requiring you to appear and plead to said declaration within twenty days thereafter, and that if you neglect to so appear and plead, a judgment by default will be entered against you, and the said plaintiff, William A. Phelps, will recover the possession of said premises in said declaration mentioned.

Galena, Nov. 27, 1851.

J. P. STEVENS,
*Att'y for Plff.*

Endorsed:

STATE OF ILLINOIS,
*Jo Daviess County, ss:*

I, Christopher E. Saunders, sheriff of said county, do hereby certify that I did, on this 28th day of November, A. D. 1851, serve the within declaration and notice by leaving a true and correct copy of the same with the within-named Bradner Smith.

C. E. SAUNDERS,
*Sheriff.*

Sheriff's fees: serving and return, 75 cts.

Sworn and subscribed before me this 29th day of November, A. D. 1851.

WM. H. BRADLEY, *Clerk.*

Endorsed: Filed Nov. 29th, 1851. Wm. H. Bradley, clerk.

And afterwards, to wit, on the said 29th day of November, A. D. 1851, at the November term, A. D. 1851, of said Jo Daviess county circuit court, in the record of the proceedings thereof in the above-entitled cause, appears of record the following entry, to wit:

WILLIAM A. PHELPS
vs.
BRADNER SMITH. } Ejectment.

The plaintiff by his attorney files his declaration and notice, and on his motion it is ordered by the court that the same be docketed, and that the defendant be ruled to plead within twenty days from this date.

And afterwards, to wit, on the 24th day of December, A. D. 1851, the above-named defendant by his attorney came and filed his plea, which is in the words and figures following, to wit:

STATE OF ILLINOIS,
*Jo Daviess County.*

CIRCUIT COURT, *Nov.* 7, 1851.

BRADNER SMITH
vs.
WILLIAM A. PHELPS and Dickenson B. Morehouse, adm'r of Robt. P. Guyard. } In ejectment.

The said defendants come and defend and say, they are not guilty of the said supposed grievances in the declaration mentioned in manner and form therein alleged, and of this they put themselves upon the country.

By WASHBURNE,
HOYT & WILSON,
*For Defts.*

Endorsed: Filed Dec. 24, 1851. Wm. H. Bradley, clerk. Refiled 25th day of August, 1856, by leave of the court. Geo. M. Mitchell, clerk.

And afterwards, to wit, on the 2d day of February, A. D. 1855, the clerk of the supreme court of the State of Illinois, at Ottawa, filed in the office of the clerk of the circuit court of said Jo Daviess county, the following certificate, to wit:

At a supreme court begun and held at Ottawa, on Monday, the 12th day of June, in the year of our Lord one thousand eight hundred and fifty-four, within and for the third grand division of the State of Illinois.

Present, the honorable Samuel H. Treat, chief justice; the honorable John D. Caton, associate justice; the honorable Walter B. Scates, associate justice.

FRIDAY, *August 4th*, 1854.

WILLIAM A. PHELPS
vs.
BRADNER SMITH. } Appeal from Jo Davis.

On this day came again the parties, and the court having dili-

gently examined and inspected, as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of opinion, that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error. Therefore, it is considered by the court that, for that error and others in the record and proceedings aforesaid, the judgment of the circuit court in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the circuit court for such other and further proceedings as to law and justice shall appertain. And it is further considered by the court, that the said appellant recover of and from the said appellee his costs by him in this behalf expended, and that he have execution therefor.

I, Lorenzo Leland, clerk of the supreme court of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order of said supreme court in the above-entitled cause of record in my office.

In testimony whereof, I hereunto set my hand and affixed the [SEAL.] seal of the said supreme court, at Ottowa, this 12th day of January, in the year of our Lord one thousand eight hundred and fifty-five.

L. LELAND,
*Clerk of the supreme court.*

Endorsed: Filed Feb'y 2d, 1855. Wm. H. Bradley, clerk,

And afterwards, to wit, on the 23d day of March, A. D. 1855, at the March term, A. D. 1855, of said Jo Daviess county circuit court, in the record of the proceedings thereof in said cause appears the following entry, to wit:

WILLIAM A. PHELPS
vs. } Ejectment.
BRADNER SMITH.

On motion of defendant upon affidavit filed, this cause is continued to the next term of court, at the costs of defendant. And it is ordered by the court that execution issue for said costs.

The affidavit mentioned in the last-recited order is in the words and figures following, to wit:

Circuit court, Jo Daviess county, Illinois, March term, 1855.

WILLIAM A. PHELPS
vs. } In ejectment.
BRADNER SMITH.

The said defendant being duly sworn according to law doth depose and say, that he cannot safely proceed to trial in this cause

on account of the absence of Charles S. Hempstead, who is a material witness on the trial of this cause, as he is informed and believes; that the said Charles S. Hempstead is a resident of the city of Galena; that he has not been subpœnaed as a witness in this cause for the reason that he is an attorney of this court, and has been in attendance during the term, and this defendant supposed he would continue in attendance and be ready to testify at any time when the case should be called for trial. But on Wednesday morning, the 21st inst., he was suddenly and at very short notice summoned to go to Chicago on important business, and has not yet returned to Galena. That he expects to prove by the said witness that he has been the agent of Dickinson B. Morehouse, the administrator of R. P. Guyard, who claims the lots the interest for which is sued for in this case (the defendant being tenant in possession at time suit was brought) as belonging to the estate of said Guyard; that as such agent of said Morehouse, administrator as aforesaid, he has had the continuous possession of said lots since their purchase of the United States, in 1838, and has paid the taxes thereon as such agent ever since. That the plaintiff was never to his knowledge before the commissioners to settle claims to Galena town lots to claim the right of pre-emption of said lots, and he would have known it if he had been, as he practiced before said board himself; that he knows of no other witness by whom he can so fully prove the most of said facts; and that he expects to have said witness here at the next term of said court to testify in this case; and that this application is not made for delay, but for the furtherance of justice in the premises.

B. SMITH.

Sworn and subscribed before me, this 22d day of March, A. D. 1855.

JOHN G. POTTS, *J. P.*

Endorsed: Filed March 23d, 1855. W. B. Green, clerk.

And afterwards, to wit, on the 17th of May, A. D. 1855, at the May term, A. D. 1855, of said Jo Daviess county circuit court, in the record of the proceedings thereof in said cause appears the following entry, to wit:

WILLIAM A. PHELPS
vs. } Ejectment.
BRADNER SMITH,

Now, at this day, came on to be heard this cause upon issue joined, and thereupon came a jury of good and lawful men, to wit: David Reed, Jonathan White, James Entwistle, Jacob Bourhe, Miner Baldwin, Wm. Pence, M. Coleman, Samuel Blake, J. H. Morse, Charles Denio, William Virtue, and Joseph Vincent, who were duly

elected, tried, and sworn. After hearing the evidence and argument of counsel they retired to consider of their verdict, and, after a short absence, returned into court with the following verdict, to wit: We, the jury, find the defendant guilty of unlawfully withholding the premises described in the plaintiff's declaration, and we find the estate established on the trial to be an estate in fee simple. It is thereupon considered by the court, that the plaintiff have and recover possession of said land and premises, to wit, the undivided half of lot number nine, (9,) and the undivided half of lot number eight, (8,) said lot eight (8) fronting forty-seven feet, more or less, on Water street, and running westwardly sixty-nine by seventy-nine feet, more or less, containing 08-100 of an acre, be the same more or less; and lot nine, fronting forty-seven feet, more or less, on said Water street, and running westerly fifty-eight by sixty-nine feet, (58 by 69,) containing 67-100 of an acre, more or less, known and designated on the plat of the late town, Iron City of Galena, said premises being situated in said county and State aforesaid. And it is further considered by the court, that the plaintiffs have and recover of the defendant their costs by them about their suit in this behalf expended, and that he have execution therefor, and that the plaintiff be awarded a writ of possession herein.

And afterwards, to wit, on the 29th day of May, A. D. 1855, as yet of said May term, A. D. 1855 of said circuit court, in the record of the proceedings thereof in said cause appears the following entry, to wit:

WM. A. PHELPS
vs. } Ejectment.
BRADNER SMITH.

Now, at this day, came the defendant, by his attorney, and filed his motion to vacate the judgment, and for a new trial under the statute in this cause.

The motion referred to in the last-recited order is in the words and figures following, to wit:

In the circuit court of the May term, A. D. 1855, Jo Davis county, Illinois.

WM. A. PHELPS
vs. } Ejectment.
B. SMITH.

Now, at this day, comes the defendant (Bradner Smith) in the above-entitled cause, and moves the court to set aside the verdict and judgment rendered against him in this cause, and for a new trial under the statute.

WRIGHLEY & JEWELL,
*Att'ys for deft.*

Endorsed: Filed May 29th, 1855. W. B. Green, clerk.

And afterwards, to wit, on the same day, to wit, on the 29th day of May, as yet of said May term, A. D. 1855, of said Jo Davis county circuit court, in the record of the proceedings thereof in said cause is the following entry, to wit:

WILLIAM A. PHELPS
vs. } Ejectment.
BRADNER SMITH.

Now, at this day, came the parties, by their attorneys. The motion of the defendant heretofore filed for a new trial of this cause under the statute is sustained by the court. It is thereupon, on motion of the defendant, by his attorney, ordered by the court that the judgment heretofore rendered in this cause be vacated, and that a new trial be granted upon the payment of all the costs recovered under the said judgment.

And afterwards, to wit, on the 2d day of November, at the October term, A. D. 1855, of said circuit court, in the record of the proceedings thereof in said cause appears the following entry, to wit:

WILLIAM A. PHELPS
vs. } Ejectment.
BRADNER SMITH.

Now, at this day, came the defendant, by his attorney, and filed his motion for leave of the court to substitute Dickinson B. Morehouse as defendant herein in lieu of Bradner Smith.

The affidavit and motion referred to in the last-recited order is in the words and figures following, to wit:

In cir. court, J. D. C., Ills., Oct. term, 1855.

W. A. PHELPS
vs. } Ejectment.
BRADNER SMITH.

Dickinson B. Morehouse, who comes and asks the court to be made a defendant in this suit, in the place and stead of said Smith, makes oath that he claims the interest in the lot sued for in this case as the administrator of one R. P. Guyard, and that as Dickinson B. Morehouse he leased the same to the said defendant by the lease which is hereto annexed and made a part of this affidavit.

D. B. MOREHOUSE.

Signed and sworn to before me, this 2d day of November, 1855.

BENJ. COOMBE,
*Justice of the peace.*

I hereby agree that it shall be considered, for the purpose of the

trial of the above cause, that the said Morehouse was in possession of the interest in the premises sued for at the time of suit brought, and that the proof of the possession of said interest in said premises, at the time of suit brought by said Morehouse and said Smith, is hereby waived.

By WASHBURNE,
*Att'y for deft.*

PHELPS
vs.
SMITH.

Notice of D. B. Morehouse to be admitted as co-defendant: comes the within-named Morehouse, on the above affidavit, and pray the court to be allowed to come a co-defendant, with said Smith, and defend this suit.

By WASHBURNE,
*His att'y.*

Endorsed: Filed Nov. 2d, 1855. W. B. Green, clerk.

And afterwards, to wit, on the 3d day of November, as yet of said October term, A. D. 1855, of said Jo Daviess county circuit court, in the record of the proceedings thereof in said cause appears the following entry, to wit:

WILLIAM A. PHELPS
vs.
BRADNER SMITH. } Ejectment (returned from supreme court.)

Now, at this day, came the parties, by their attorneys, and thereupon came on to be heard the motion of the defendant to substitute Dickinson B. Morehouse, as defendant in this cause, in place of Bradner Smith, which motion, after argument by counsel, is overruled by the court, to which ruling of the court the defendant, by his counsel, excepts, and thereupon, on motion of Dickinson B. Morehouse, landlord of the defendant, by E. B. Washburne, esqr., his attorney, he is permitted to come in as a co-defendant with the defendant, his tenant—said Morehouse admitting that he was in possession of the premises sued for, and the interest in them sued for at the time of the commencement of this suit; to which permission the plaintiff, by his attorney, excepts.

And afterwards, to wit, on the 5th day of November, as yet of said October term, A. D. 1855, of said Jo Daviess county circuit, in the record of the proceedings thereof in said cause, appears the following entry, to wit:

WILLIAM A. PHELPS
vs.
BRADNEY SMITH. } Ejectment.

By agreement of the parties herein by their attorneys, it is

ordered by the court that this cause be continued to the next May term of this court, upon stipulations filed by defendant's attorney waiving time to appeal to supreme court.

The stipulations referred to in the last-recited entry are in the words and figures following, to wit:

PHELPS
vs.
SMITH. } In ejectment.

Oct. term, 1855.

It being agreed by the *by the* parties to this suit by their attorney that this case shall not be tried at the next March term of the said court, but shall be set down for trial at the next May term of this court; and it is hereby further agreed by the attorney of the said defendant, that if there should not be time enough left after the trial at the said May term, as allowed by the statute, to take the said cause by appeal to the supreme court, I agree not to take advantage of the want of time, but to take the case up in "season" for trial at the June term of said supreme court, 1856, in case said judgment shall be against the defendant, or let the judgment in the circuit court stand.

WASHBURNE, *for Deft.*

Endorsed: Filed Nov. 5th, 1855. W. B. Green, clerk.

And afterwards, to wit, on the 19th day of May, at the May term, A. D. 1856, of said Jo Daviess county circuit court, in the record of the proceedings thereof in said cause, appears the following entry, to wit:

W. A. PHELPS
vs.
BRADNER SMITH. } Ejectment.

The defendant by his attorney comes and moves the court for leave to file two additional pleas; which motion is sustained by the court, and said pleas are filed.

The pleas referred to in the last above-recited order are in the words and figures following, to wit:

THE STATE OF ILLINOIS,
*County of Jo Daviess, ss.*

In the circuit court of said county, of the May term, A. D. 1856.

BRADNER SMITH and
Dickinson B. Morehouse
ads.
WILLIAM S. PHELPS. } Pleas of puis darrein.

Continuance filed by leave of the court.

And now, at this day, to wit, of the 19th day of May, in the year of our Lord one thousand eight hundred and fifty-six, it being the first day of the May term aforesaid of said court, to which day and term all the proceedings in this cause were continued from the October term, A. D. 1855, of said court, which was begun on the third Monday of October, in the year aforesaid, to wit, from the fifth day of November, A. D. 1855, as yet of said October term, comes the said defendant by E. B. Washburn, their attorney, and saith that the said plaintiff ought not further to have or maintain his aforesaid action thereof against him, the said defendant, because he saith that after the last continuance of this cause, that is to say, after the said October term, A. D. 1855, to wit, on the said fifth day of November, in said term of said court, from which time this cause was regularly continued as aforesaid to the present term thereof, and before this day, to wit, on the 19th day of January, in the year of our Lord one thousand eight hundred and fifty-six, at the county of Fayette, in the State of Ohio, the said plaintiff and Eliza Ann, his wife, by their deed of conveyance, sealed with their seals, bearing date a certain day and year therein mentioned, to wit, the day and year last aforesaid, granted, bargained, sold, conveyed, and confirmed, for a consideration in said deed mentioned, to wit, the sum of twenty-one hundred and seventy-five dollars in hand paid to the said plaintiff, the receipt whereof is in said deed acknowledged, all those certain lots, pieces *of* parcels of land and premises in the said plaintiff's declaration in this cause described, to Madison Y. Johnson and Isaac P. Stevens, of the city of Galena, county of Jo Daviess, and State of Illinois; which said deed of the said plaintiff and his said wife was duly acknowledged on the 23d day of January, A. D. 1856, by the said plaintiff and his wife, and delivered to the said Madison Y. Johnson and Isaac P. Stevens, and by the said Johnson and Stevens filed for record in the recorder's office of said county of Jo Daviess, and by said recorder duly recorded on the 27th day of February, A. D. 1856, in book "Y" of deeds, pages 243 and 244, as will more fully appear, reference being had to said records; which said deed of conveyance not being in possession of the said defendant, and the said defendant having no control over the same, he cannot produce to this court; and prays that a certified copy of said record of said deed, under the hand of the clerk of the circuit court of said county of Jo Daviess, and the seal of said court thereunto attached, and now to the court here shown, may be taken and received in place of said original deed. Said defendants further avers that by virtue of said deed of conveyance all the estate, right, title, interest, and claim of said plaintiff in and to the said lands and premises in the said plaintiff's declaration described were, by the execution and delivery of the said deed of conveyance, vested in the said Madison Y. Johnson and Isaac P. Stevens, and that the said plaintiff now neither has nor pretend to have any interest or estate of any name

or description whatsoever in or to the same; and this the defendants are ready to verify; wherefore they pray judgment *of* the said plaintiff ought further to have or maintain his aforesaid action thereof against them, the said defendants, &c.

And for a further plea in this behalf, the said defendants, by leave of the court, &c., says that the said plaintiff ought not further to have or maintain his aforesaid action thereof against him, the said defendants, because that, after the last continuance of this cause, at the October term, A. D. 1855, of this court, to wit, on the fifth day of November, A. D. 1855, as yet of the October term aforesaid, from which term this cause was regularly continued as aforesaid to the present term of this court; and upon this day, to wit, on the 19th day of January, A. D. 1856, at the county of Fayette, and State of Ohio, the said plaintiff and Eliza Ann, his wife, made and executed, and on the 23d day of said month of January, duly acknowledged, according to the laws of the State of Ohio, their certain deed of conveyance, which said deed and acknowledgment are in the words and figures following, that is to say:

This deed, made this nineteenth day of January, in the year of our Lord one thousand eight hundred and fifty-six, between William A. Phelps and Eliza Ann Phelps, his wife, of the county of Fayette, and State of Ohio, of the first part, and Madison Y. Johnson and Isaac P. Stevens, of the city of Galena, county of Jo Daviess, and State of Illinois, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of twenty-one hundred and seventy-five dollars to the said party of the first part, in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, convey, and confirm unto the said parties of the second part, their heirs and assigns forever, all the following described lots or parcels of land situated, lying, and being in the county of Jo Daviess, and State of Illinois, to wit, the whole of lot seven; said lot seven fronts upon Water street, in the city of Galena, county and State last aforesaid, forty-seven feet; also the undivided half of lots eight and nine; said last-mentioned lots fronting upon Water street, in said city of Galena, each of said lots being forty-seven feet front upon said Water street, in said city of Galena; all of said lots above named being situated on the west side of Galena river, in said city of Galena, as will more fully and at large appear by reference to the plat of said city of Galena: To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in any wise thereunto appertaining, and all the estate, right, title, interest, and claim whatsoever of the said party of the first part either in law or equity to the only proper use, benefit, and behoof of the said parties of the second part, their heirs and assigns, forever; and the said party of the first part the aforesaid tract or parcel of land and

premises unto the said parties of the second part, their heirs and assigns, against the claim or claims of all and every person whatsoever claiming by, through, or under him, doth and will warrant and forever defend by these presents.

In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

WILLIAM A. PHELPS, [L. S.]
ELIZA ANN PHELPS, [L. S.]

Signed, sealed, and delivered
in presence of—
GARD. C. PLUMB,
GEO. B. GARDNER.

STATE OF OHIO,
*Fayette County*, ss.

I, George B. Gardner, a justice of the peace in and for said county and the State aforesaid, do hereby certify that William A. Phelps and Eliza Ann Phelps are personally known to me as the persons whose names are subscribed to the annexed deed, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth; and the said Eliza Ann Phelps, wife of the said William A. Phelps, having been by me examined separate and apart and out of hearing of her said husband, and the contents and meaning of the said instrument of writing having been by me made known and fully explained to her, she acknowledged that she had freely and voluntarily executed the same, and relinquished her dower to the lands and tenements therein mentioned, without compulsion of her husband, and that she does not wish to retract the same.

Given under my hand and seal this twenty-third day of January, A. D. 1856.

GEO. B. GARDNER, [L. S.]

THE STATE OF OHIO,
*Fayette County*, ss.

I, Richard Walkinson, clerk of the court of common pleas in and for the county aforesaid, do hereby certify that Geo. B. Gardner, whose genuine signature appears above, is and was, at the time of signing the same, a justice of the peace in and for said county of Fayette, duly commissioned and sworn, and that full faith and credit are due to all his official acts as such.

Witness my hand and seal of office, at the court-house at Wash-
[SEAL.] ington, this 23d day of January, A. D. 1856.

RICHARD WILKINSON, *Clerk*.

Which said deed so made, executed, and acknowledged by the

said plaintiff and his said wife as aforesaid, the said plaintiff and his said wife duly delivered to the said Madison Y. Johnson and Isaac P. Stevens, the grantees in said deed mentioned, and was by the said Johnson and Stevens afterwards filed for record in the recorder's office of said county of Jo Daviess, and by the said recorder duly recorded in book "G," of deeds, in pages 243 and 244, as by reference to said record will more fully appear.

And the said defendants aver that the land and premises mentioned and described in the said plaintiff's declaration in this case, and for the recovery of the possession whereof this action was commenced by the said plaintiff, and a part of the land, are premises described in said deed of the said plaintiff and wife to the said Johnson and Stevens above recited; and that in and by said deed so executed, acknowledged, and delivered as aforesaid, the said plaintiff conveyed to the said Madison Y. Johnson and Isaac P. Stevens all his right, title, and interest of any and every kind in and to the land and premises described in his said declaration, and that the same are now absolutely vested in the said Johnson and Stevens, the grantees in said deed named; and that the said plaintiff now neither has nor claims to have any interest or estate of any name or description whatever in or to the same.

And this the said defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought further to have or maintain his aforesaid action thereof against them, the said defendants, &c.

E. B. WASHBOURNE.
WEIGLEY & JEWETT,
*Att'ys for Deft.*

Endorsed: Filed this 19th day of May, 1856. Geo. M. Mitchell, clerk.

And afterwards, to wit, on the 19th day of August, at the August term, A. D. 1856, of said Jo Daviess county circuit court, in the record of the proceedings thereof in said cause, appears the following entry, to wit:

WILLIAM A. PHELPS
vs.
BRADNEY SMITH. } Ejectment.

Now *cause* came on to be heard the demurrer heretofore filed by the plaintiff by his attorney to the two additional pleas filed under leave of the court at the last term; which demurrer, after argument, is taken under advisement by the court.

The demurrer referred to in the last-recited entry is in the words and figures following, to wit:

W. A. PHELPS
vs.
BRADNER SMITH.

In the circuit court, May term, A. D. 1856.

And now at this day comes the said plaintiff; and as to the said first and second pleas of puis darrein continuance filed at this term of this court of the said defendant, said plaintiff saith the same is not sufficient in law, and he is not bound to make answer thereto; wherefore he doth demur, and for special cause of demurrer shows to the court the following:

Because the statute restricts the defendant to the plea of general issue above.

2d. Because said pleas are insufficient in substance and form, and improperly filed.

3d. Because the facts set forth and pleaded in said plea are not sufficient to dismiss the same.

4th. And for other sufficient reasons; wherefore he doth demur, and pray judgm't.

JOHNSON,
*Plff. Att'y.*

Joinder on demurrer.

E. B. WASHBURNE, and
WEIGLEY & JEWETT,
*For Defts.*

Endorsed: Filed 20th May, 1856. Geo. M. Mitchell, clerk.

And afterwards, to wit, on the 25th day of August, as yet of said August term, A. D. 1856, of said Jo Daviess county circuit court, in the record of the proceedings thereof in said cause appears the following entry, to wit:

WILLIAM A. PHELPS
vs.
BRADNER SMITH. } Ejectment.

The court having fully considered, and being fully advised upon the demurrer heretofore filed by the plaintiff by his attorney to the defendant's pleas of puis demur continuance heretofore filed by leave of the court, sustains the demurrer; and on motion of the defendant's attorney, leave is granted him by the court to withdraw said plea of puris darein continuance, and also to refile the plea of general issue; which is accordingly done.

And afterwards, to wit, on the 27th day of October, at the October term, A. D. 1856, of said Jo Daviess county circuit court, in the record of the proceedings thereof in said cause, appears the following entry, to wit:

WILLIAM A. PHELPS
vs.
BRADNER SMITH and Dickinson B. Morehouse. } Ejectment.

Now at this day came the parties by their attorneys, and, upon issue joined, thereupon came a jury of good and lawful men, to wit: Wm. De Camp, J. D. Gliddon, Jos. Martin, David James, Lewis Lesch, Jesse Holdcomb, Orson Hunt, Charles Woodham, Wm. Hogan, A. McKillips, James Lawrence, H. Vanbalkenberg, who were duly elected, tried, and sworn. After hearing evidence, the further consideration of this cause is postponed until to-morrow morning.

And afterwards, to wit, on the 28th day of October, as yet of said October term, A. D. 1856, of said Jo Daviess county circuit court, in the record of the proceedings thereof in said cause appears the following entry, to wit:

WILLIAM A. PHELPS
vs.
BRADNER SMITH and Dickinson B. Morehouse. } Ejectment.

Now at this day came again the jury yesterday *companeled* herein, and after hearing the arguments of counsel, they retired to consider of their verdict, and after a short absence they returned into court with the following verdict, to wit: "We, the jury, find the defendant guilty of unlawfully withholding the possession of the undivided half of lots eight and nine, as described in the plaintiff's declaration, and find the estate established in the plaintiffs to be an estate in fee, and we also assess therein damages for withholding the premises at one hundred and eighty-four dollars and thirty-seven and one-half cents;" and the defendants by their attorney moves the court for a new trial herein, and files his motion and reasons therefor.

The motion referred to in the last above-recited order is in the words and figures following, to wit:

WILLIAM A. PHELPS
vs.
B. SMITH and D. B. Morehouse. }

In the circuit court of the Oct. term, A. D. 1856.

Now at this day come the defendants by Washburne, Wiegley, and Jewett, and move the court for a new trial in this cause for the following reasons:

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1st. The verdict is against the evidence and the weight of evidence.

2d. The court gave improper instructions to the jury at the instance of the plaintiff.

3d. The court refused the instructions of the defendant, which should have been given to the jury.

WASHBURNE, WIEGLEY & JEWETT,
*Atty's for Defts.*

Endorsed: Filed 28th Oct., 1856. Geo. M. Mitchell, clerk.

And afterwards, to wit, on the 1st day of November, A. D. 1856, as yet of said October term, A. D. 1856, of said Jo Daviess county circuit court, in the record of the proceedings thereof in said cause is the following entry, to wit:

WILLIAM A. PHELPS
vs.
BRADNER SMITH and Dickinson B. Morehouse. } Ejectment.

Now, at this day, came the plaintiff, by his attorney, and enters a remittiter for the sum of one hundred and eighty-four dollars and thirty-seven and one-half cents. And now comes on to be heard the motion heretofore filed by the defendants, by their attorneys, for a new trial herein, which motion, after argument, is overruled by the court, to which ruling and decision of the court the defendants, by their attorneys, excepts; and the plaintiff, by his attorney, moves the court for judgment upon the verdict of the jury heretofore entered.

It is thereupon considered by the court, that the plaintiff have and recover possession of said land and premises, to wit: the undivided half of lot number nine, (9,) and the undivided half of lot number eight, (8,) said lot eight (8) fronting forty-seven feet, more or less, on Water street, and running westwardly sixty-nine by seventy-nine feet, more or less, containing 08-100 of an acre, be the same more or less; and said lot nine, fronting forty-seven feet, more or less, on said Water street, and running westwardly fifty-eight by sixty-nine feet, (58 by 69,) containing 67-100 of an acre, more or less, known and designated on the plat of the late town, now city of Galena, said premises being situated in the county of Jo Daviess, and State of Illinois. And it is further considered by the court, that the plaintiff have and recover of the defendants his costs by him about his suit in this behalf expended, and that execution issue therefor. And the defendants, by their attorneys, prays an appeal to the supreme court, which is granted, conditioned that said defendants file an appeal bond with the clerk, with Charles S. Hempstead as security, in the sum of one thousand dollars, in thirty days from the rising of court.

And afterwards, to wit, on the 21st day of November, as yet of said October term, A. D. 1856, of said Jo Daviess county circuit court, in the record of the proceedings thereof in said cause appears the following entry, to wit:

WILLIAM A. PHELPS
vs.
BRADNER SMITH and Dickinson B. Morehouse. } Ejectment.

Now, at this day, came the defendants, by their attorney, and move the court to set aside so much of the order heretofore entered in this cause by which the said defendant, Smith, prayed an appeal to the supreme court; and the said motion being sustained by the court, it is ordered, that D. B. Morehouse, one of the defendants in this cause, be allowed an appeal to the supreme court from the judgment heretofore entered in this cause, by entering into bond with Charles S. Hempstead, as security, in the sum of one thousand dollars, within thirty days from the rising of this court, to which ruling and decision of the court the plaintiff, by his attorney, excepts.

And afterwards, to wit, on the 12th day of December, A. D. 1856, the said defendant, D. B. Morehouse, comes and files with the clerk of said Jo Davis county circuit court his appeal bond, which is in the words and figures following, to wit:

Know all men by these presents, that we, Dickinson B. Morehouse, as principal, and Charles S. Hempstead, as security, are held and firmly bound unto William A. Phelps in the penal sum of one thousand dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, firmly by these presents. Sealed with our seals, and dated this twelfth day of December, A. D. 1856.

The condition of the above obligation is such, that whereas the above-named William A. Phelps did at the October term of the circuit court of Jo Daviess county, Illinois, obtain a judgment in a certain action of ejectment against the above-named Dickinson B. Morehouse, who was impleaded with one Bradner Smith; and whereas the said Morehouse did at the October term of the circuit court aforesaid, pray an appeal from said judgment to the supreme court of Illinois; and whereas the said prayer of the said Morehouse was granted, conditioned that he would enter into bond, in the sum of one thousand dollars, with the above-named Charles S. Hempstead, for security, within thirty days after the rising of said court; and whereas the said circuit court, at the October term thereof aforesaid, did rise on the 24th day of November, A. D. 1855:

Now, if the said William A. Phelps, whatever judgment, costs, interest, and damages may be rendered against him, the said Morehouse, on the trial or dismissal of said appeal in the supreme court

aforesaid, then the above obligation to be paid; otherwise, to remain in full force and effect.

D. B. MOREHOUSE, [L. S.]
CHAS. S. HEMPSTEAD, [L. S.]

Approved: W. R. ROWLEY, *Clerk.*

Endorsed: Filed Decr. 12th, 1856. W. R. Rowley, clerk.

The bill of exceptions, as certified by the court, is in the words and figures following, to wit:

STATE OF ILLINOIS,
*Jo Daviess County, ss:*

At the October term of the circuit court of Jo Daviess, in said State, A. D. 1856:

WILLIAM A. PHELPS,
vs.
BRADNOR SMITH and DICKINSON B. MOREHOUSE. } Ejectment.

Be it remembered, that on this, the day of November, A. D. 1856, and yet at the October term of said court, the above-entitled cause came on for trial before a jury. And the plaintiff, to maintain the issue on his part, offered in evidence a certain deed from R. P. Guyard to the said plaintiff, in the words and figures following:

R. P. Guyard to William A. Phelps—Transfer.

MINERAL POINT, CRAWFORD COUNTY, MICHIGAN TERRITORY,
*Nov.* 8, 1829.

To Capt. J. C. LEGATE,
*Sup't of U. S. Lead Mines:*

SIR: I have this day sold, transferred, and set over, and by these presents do grant, bargain, sell, transfer, and set over, unto Wm. A. Phelps, his heirs, and assigns, all my right, title interest, or claim whatsoever in and to the three lots of ground I own in the town of Galena, Jo Davies county, State of Illinois, situated on the wharf row, the number not recollected, supposed to be either lots 4, 5, and 6, or 5, 6, and 7, bounded as follows: on the east by Fever river, on the west by Main street, or a triangular square, and on the south by a lot granted to me in the spring of 1828, and sold by me to M. Benarett, and on the north by a street, alley, or other lots.

The most southern of these three lots was granted, by permit, to

myself in the spring of 1828; the other two adjoining was granted to John Ward and Nathaniel Johnson, one lot to each, and by them transferred to me—all of which is entered on record in the permit book.

Given under my hand and seal this, the 8th November, 1829.

R. P. GUYARD, [SEAL.]

Approved November 9th, 1829.

THO. C. LEGATE,
*Sup. U. S. L. M.*

TERRITORY OF WISCONSIN,
*County of Iowa.*

William Henry, of the town of Mineral Point, in said county and Territory, being duly sworn, on his oath, says: that he was well acquainted with R. P. Guyard, whose name appears to the annexed deed of conveyance, or letter, addressed to Thos. C. Legate, dated at Mineral Point, Nov. 8th, 1829, when said Guyard resided in Galena, and when he lived at Mineral Point; and that he (affiant) has seen much of said Guyard's handwriting, and has frequently seen him write, and is well acquainted with his hand writing. This affiant knows that said Guyard lived at Mineral Point in the year 1829, when the annexed deed appears to have been given; and this affiant believes that the signature, R. P. Guyard, to the said deed is in the handwriting of the said R. P. Guyard. This affiant further says that he was well acquainted with Thomas C. Legate, and knows that he was acting superintendent of the United [States] Lead Mines, on the 9th of November A. D. 1829.

He is also well acquainted with the handwriting of the said Thomas C. Legate, and has frequently seen him write, and believes that the words and signatures on the left of the annexed Deed "Approved Nov. 9, 1829—Tho. C. Legate, Sup. U. S. L. M.," are in the handwriting of the said Thomas C. Legate; and further this affiant saith not.

(Signed) WILLIAM HENRY.

TERRITORY OF WISCONSIN,
*County of Iowa.*

I, the undersigned, clerk of the district court of said county and Territory, which is a court of record, certify that William Henry, of the town of Mineral Point, who is personally known to me to be the person mentioned in the foregoing affidavit, and who signed the same in my presence, being also known to me to be a competent and credible witness, came before me, in his own proper person, and made oath to the facts stated in the foregoing affidavit.

In witness of which affidavit so made, and of the fact so stated, as well as those stated herein, I have hereunto set my [SEAL.] hand and the official seal of said court, at Mineral Point, this 16th day of June, 1847.

WILLIAM J. HENRY,
*Clerk district court U. S., Iowa co., Wis. Ter.*

Endorsed: Filed June 18th, 1847, at ½ past 9 o'clock a. m.

STATE OF ILLINOIS,
*Jo Daviess County, ss:*

RECORDER'S OFFICE,
GALENA, *June 18th*, 1847.

I, Jeremiah Bettis, recorder in and for said county, do certify that the annexed deed of transfer, &c., are recorded in Book H of Deeds, pages 384 and 385.

Attest: JEREMIAH BETTIS.

STATE OF IOWA,
*County of Dubuque.*

I, the undersigned, clerk of the district court of said county and State, which is a court of record, do certify that Thomas McKnight, of said county, a competent and credible witness, to me personally known, came before me in his own proper person, and being by me duly sworn, according to law, stated, under oath, that he personally knew and was well acquainted with Robert P. Guyard, whose name appears to the annexed deed of conveyance, or letter, addressed to Thomas C. Legate, dated at Mineral Point, Nov. 8th, 1829, and well knew his signature, having repeatedly transacted business with him, and having frequently seen him write; that he, the said McKnight, was the assistant superintendent of the lead mines in 1828 and 1829, and as such superintendent granted the permits referred to in said deed as having been granted to said R. P. Guyard, John Ward, and Nathaniel Johnson; and himself (the said McKnight) made the transfer on the permit book of the two lots permitted to said Ward and said Johnson; and as such assistant superintendent transacted that business with the said R. P. Guyard, and other business, by which means he became familiar with said Guyard's handwriting. The said McKnight further stated, under oath, that he had particularly examined the signature, "R. P. Guyard," to the said deed of Nov. 8, 1829, and verily believes that the name of R. P. Guyard, subscribed to said deed, is in the handwriting of said R. P. Guyard, and was thereto subscribed by him.

And I further certify that the said Thomas McKnight further stated, under oath, that he personally knew and was well acquainted with Thomas C. Legate for several years prior to his death, which took place in March, 1846, and knows that he was acting superin-

tendent of the United States Lead Mines on the 9th of November, 1829, and was well acquainted with the handwriting and signature of the said Thomas C. Legate, and well knew the same, having repeatedly and frequently seen him write, and transacted business with him; and that he had particularly examined the signature, *Thomas* "Thomas C. Legate," and verily believes the words and signatures on the left of the annexed deed, "Approved Nov. 9th, 1829—Thomas C. Legate, sup. U. S. L. M.," are in the handwriting of the said Thomas C. Legate, and were thereto subscribed by him.

In testimony whereof, the said Thomas McKnight has hereunto subscribed his name in my presence, as having sworn to the facts heretofore stated, and I have hereunto subscribed my name as clerk of the court, and affixed the seal of said court, at Dubuque, this 4th day of February, A. D. 1848. [L. S.]

THOMAS McKNIGHT.

J. P. VAN HAYEN,
*Clerk Dist. Court.*

Endorsed: Filed Feb. 5th, 1848, at 9 o'clock a. m.

STATE OF ILLINOIS,
*Jo Daviess County, ss.*

RECORDER'S OFFICE,
GALENA *Feb. 5th*, 1848.

I, Cyrus Aldrich, recorder in and for said county, do certify that the within deed of conveyance and the annexed affidavit and certificates are recorded in book J of Deeds, page 340, 341, and 342.

Attest: CYRUS ALDRICH,
*Recorder.*

To the reading of said deed in evidence the defendants objected generally, and that said deed did not describe the property mentioned in the declaration; which objections were overruled by the court, and said deed was read in evidence to the jury: to such ruling by the court, and the admission of said deed in evidence, the defendants then and there excepted.

The plaintiffs then offered in evidence the certificate of the register of the land office at Dixon, showing the entry of lots eight and nine, which was admitted in evidence without objection, as follows:

Nos. 224 and 225. LAND OFFICE, DIX., ILLINOIS,
*October 3d*, 1850.

I, Silas Noble, register of the land office at Dixon, Illinois, do certify that the legal representatives of R. P. Guyard and D.

B. Morehouse, of the county of Jo Daviess, and State of Illinois, did, on the twentieth day of February, in the year of our Lord one thousand eight hundred and thirty-eight, purchase of the General Government, at this office, the lot numbered eight, on Water street, in Galena, Jo Daviess county, Illinois, containing eight hundredth of an acre; also, lot numbered nine, on Water street above mentioned, containing sixty-seven thousandth of an acre; and that said land, at the time of said purchase, was within the district of the land subject to sell at this office, and rendered subject to sale by land, all of which appears of record in my office.

Given under my hand the day and year first above written.

SILAS NOBLE,
*Register.*

The plaintiff, to further maintain the issue on his part, offered and read in evidence to the jury, the patents issued by the United States Government to the legal representatives of Robert P. Guyard and Dickinson B. Morehouse for lots eight and nine, described in the declaration of plaintiff.

*Receiver's receipt, Register's certificate.—No.* 225.

The United States of America to all to whom these presents shall come, greeting:

Whereas the legal representatives of Robert P. Guyard and Dickinson B. Morehouse, of Jo Daviess county, Illinois, have deposited in the General Land Office of the United States, as certified by the register of the land office at Galena, whereby it appears that full payment has been made by the said legal representatives as above named, according to the provisions of the act of Congress of the 2d day of July, 1836, entitled an act to amend an act entitled an act authorising the laying off a town on Bean river, Fever river, in the State of Illinois, and for other purposes, approved fifth February, 1829, for lot numbered eight, fronting forty-seven feet on Water street, and running westwardly sixty-nine by seventy-nine feet, containing eight-hundredths of an acre, in the town of Galena, according to the official plat of the survey of the said town, returned to the general land office, which said lot has been purchased by the said representatives of Robert P. Guyard and Dickinson B. Morehouse:

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said representatives of Robert P. Guyard and Dickinson B. Morehouse, and to their heirs, the said lot above described: to have and to hold the same, together with all the rights, privileges, immunities, and ap-

purtenances of whatsoever nature hereunto belonging, unto the said representatives of Robert P. Guyard and Dickinson B. Morehouse, and to their heirs and assigns forever, as tenants in common, and not as joint tenants.

In testimony whereof, I, James K. Polk, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the first day of January, in the year of our Lord one thousand eight hundred and forty-six and of the independence of the United States the seventieth.

By the President,

[SEAL.] JAMES K. POLK,

By J. KNOX WALKER,

*Secy.*

Recorded vol. 1, page 225.

S. H. LAUGHLIN,

*Recorder of the General Land Office.*

*Receiver's receipt, Register's certificate.—No.* 224.

The United States of America to all whom these presents shall come, greeting:

Whereas the legal representatives of Robert P. Guyard and Dickinson B. Morehouse, of Jo Daviess county, Illinois, have deposited in the General Land Office of the United States a certificate of the register of the land office at Galena, whereby it appears that full payment has been made by the said legal representatives as above named, according to the provisions of the act of Congress of the 2d day of July, 1836, entitled an act to amend an act entitled an act authorizing the laying off a town on Bean river (Fever river) in the State of Illinois, and for other purposes, approved fifth February, 1829, for lot numbered nine, fronting forty-seven feet on Water street, and running westwardly fifty-eight by sixty-nine feet, containing sixty-seven thousandths of an acre, in the town of Galena, according to the official plat of the survey of the said town, returned to the general land office, which said lot has been purchased by the said representatives of Robert P. Guyard and Dickinson B. Morehouse, as aforesaid:

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said representatives of Robert P. Guyard and Dickinson B. Morehouse, and to their heirs, the said lot above described: to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the

said representatives of *of* Robert P. Guyard and Dickinson B. Morehouse, and to their heirs and assigns forever, as tenants in common, and not as joint tenants.

In testimony whereof, I, James K. Polk, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the first day of January, in the year of our Lord one thousand eight hundred and forty-six, and of the independence of the United States the seventieth.

By the President,

[SEAL.] JAMES K. POLK.

By J. KNOX WALKER,

*Secy.*

Recorded vov.1, page 224.

S. H. LAUGHLIN,

*Recorder of the General Land Office.*

The plaintiff further offered in evidence the record book of the commissioners to adjust and settle the pre-emption claims to lots in Galena, which record book was admitted to be the record and adjudications of the commissioners appointed to settle pre-emptions to lots in Galena, and read in evidence, therefore, the following order:

Certificate issued, see page 344.

The plaintiff further read in evidence, from the same record of the commissioners, the following adjudication and award by the commissioners:

Certificate issued.

The legal representatives of Robert P. Guyard claim one undivided half lots, originally No. 5 and 6, under present survey No. 8 and 9, Water street; and Dickinson B. Morehouse claims the other half of said lots, and in support of the claim produced evidence that said lots were improved in the year 1828 by said Robert P. Guyer and Dickinson B. Morehouse.

See page 170 and 171.

The commissioners are, therefore, *are* of opinion that the legal representatives of Robert P. Guyard are entitled to a pre-emption to one undivided half of lots No. eight and nine, and Dickinson B. Morehouse the other half of said lots; said lot No. 8 fronting 47 feet on Water street, and running westwardly 69 by 79 feet, containing .08 of an acre, and lot No. 9 fronting 47 feet on Water street, and running westwardly 58 by 69 feet, containing .967 of an acre of the first class.

The plaintiff, further to maintain the issue on his part, introduced and read as evidence to the jury the acts of Congress of 1829 and 1836, authorizing the laying off a town on Bean river, and appointing commissioners, as follows, to wit:

1. *Be it enacted, &c.*, That a tract of land in the State of Illinois, at and including Galena, on Bean river, shall, under the direction of the surveyor of the public lands for the States of Illinois and Missouri, and the Territory of Arkansas, be laid off into town lots, streets, and avenues, and into out-lots, having regard to the lots and streets already surveyed, in such manner and of such dimensions as he may think proper: *Provided*, That the tract so to be laid off shall not exceed the quantity contained in one entire section, nor the town lots one-quarter of an acre each, nor shall the out-lots exceed the quantity of two acres each. When the survey of the lots shall be completed, a plat thereof shall be returned to the Secretary of the Treasury, and within twelve months thereafter the lots shall be offered to the highest bidder, at public sale, under the direction of the President of the United States, and at such other times as he shall think proper: *Provided*, That no town lot shall be sold for a sum less than five dollars: *And provided, further*, that a quantity of ground of proper width on the said river, and running therewith the whole length of the said town, shall be reserved from sale for public use, and remain forever a common highway.

2. *And be it further enacted*, That it shall be the duty of the said surveyor to class the lots already surveyed in the said town of Galena into three classes, according to the relative value thereof, on account of situation and eligibility for business, without regard, however, to the improvements made thereon; and previous to the sale of the said lots as aforesaid, each and every person, or his, her, or their legal representative or representatives, who shall heretofore have obtained from the agent of the United States a permit to occupy any lot or lots in the said town of Galena, or who shall have actually occupied and improved any lot or lots in the said town, or within the tract of land hereby authorized to be laid off into lots, shall be permitted to purchase such lot or lots, by payment therefor in cash, if the same fall within the first class as aforesaid, at the rate of twenty-five dollars per acre; if within the second class, at the rate of fifteen dollars per acre; and if within the third class, at the rate of ten dollars per acre: *Provided*, That no one of the persons aforesaid shall be permitted to purchase, by authority of this section, more than one-half acre of ground, unless a larger quantity shall be necessary to embrace permanent improvements already made.

Approved February 5, 1829.

Also "An act to amend an act entitled an act authorizing the laying off a town on Bean river, in the State of Illinois, and for

other purposes," approved fifth February, eighteen hundred and twenty-nine.

1. *Be it enacted, &c.*, That all acts and duties required to be done and performed by the surveyor of the States of Illinois and Missouri and the Territory of Arkansas, under the act to which this is an amendment, shall be done and performed by a board of commissioners, of three in number, any two of shall form a quorum to do business; said commissioners to be appointed by the President of the United States, and shall, previous to their entering upon the discharge of their duties, take an oath or affirmation to perform the same faithfully and impartially.

2. *And be it further enacted*, That the said commissioners shall also have power to hear evidence and determine all claims to lots of ground arising under the act to which *there* is an amendment; and for this purpose the said commissioners are authorized to administer all oaths that may be necessary, and reduce to writing all the evidence in support of claims to pre-emption presented for consideration; and when all the testimony shall have been heard and considered, the said commissioners shall file with the register and receiver of the land office at Galena the testimony in the case, together with a certificate in favor of each person having the right of pre-emption; and upon making payment to the receiver at Galena for the lot or lots to which such person is entitled, the receiver shall grant a receipt therefor, and issue certificates of purchase, to be transmitted to the General Land Office, as in other cases of the sale of public land.

3. *And it is further enacted*, That the register and receiver at Galena, after the board of commissioners have heard and determined on the case of pre-emption under the act to which this is an amendment, shall expose the residue of lots to public sale to the highest bidder, after advertising the same in three public newspapers, at least six weeks prior to the day of sale, in the same manner as provided for the sale of the public land in other cases; and after paying to the commissioners the compensation hereinafter allowed them, and all the other expenses incident to the said survey and sale, the receiver of the land office shall pay over the residue of the money he may have received from the sale of lot aforesaid by pre-emption as well as at public auction into the hands of the commissioner of Jo Daviess county, to be expended by them in the erection of public buildings, and the construction of suitable wharves in the town of Galena.

4. *And be it further enacted*, That the commissioners appointed to carry this act into effect shall be paid by the receiver six dollars each, per day, for their services, for every day they are necessarily employed.

"Approved July 2d, 1836."

It was then admitted by the counsel for the defendants that the

defendants were in the exclusive possession of the lots described in the plaintiff's declaration at the time of the bringing of this suit, and up to the present time, but denied that the lots described in the deed were the same lots mentioned in the declaration, and of which they were in the possession.

The plaintiff then introduced and examined as a witness Charles R. Bennett, who testified that he was a surveyor, and was employed by the commissioners to survey the lots in Galena, Illinois, under the act of Congress; and as such surveyor, in connexion with James Craig, now deceased, he did survey and lay off the lots in controversy.

That the lots mentioned in the deed from Guyard to Phelps were laid off by the agent of the United States lead mines, and were called and known as "wharf row," and laid along the river south of Warren street, according to the plat; the lots run into the river, and extended back so as to embrace a part of lots eight and nine by present survey.

In surveying the city into lots, by order of the commissioners, under the act of Congress, we paid no attention to these six "wharf row" lots, but run the street over them, paying no attention to them, but crowding them back; lots five and six (5 and 6) in Wharf row by being crowded back became a part of the present lots eight and nine.

It was necessary to lay out a street along the river, and in doing so, one had to run over these wharf lots; but lots eight and nine, by present survey, represent lots five and six in "Wharf row." When the street was surveyed, Wharf row, instead of running to the river, was pushed back, and a street was laid out between the lots as laid out and the river; and lots eight and nine were surveyed in lieu of five and six—the numbers eight and nine by the new survey representing and being a part of lots five and six by old survey.

I took the lots known as Wharf row for Water street, under the order of the commissioners in laying off the town, and lots eight and nine was, by order of the commissioners, given instead, and represented lots five and six, and is a part of the same ground embraced in original lots five and six. I made three maps of the survey of the town. The one before me was one of the original maps. I never surveyed the lots in Wharf row, but from the scale on the maps of old survey, think they were about one hundred and twenty feet deep. Water street as laid out was forty feet wide. The lines of the lots by the old and new survey were not parallel. I judge, from the distance run back, that a part of five and six are embraced in eight and nine.

The plaintiff then introduced and examined Milton Wadleigh, who testified that he was city surveyor since 1849. Knows lots eight and nine, in block B, in dispute. Don't know of his own knowledge anything about lots five and six; has surveyed these

lots, and at one time made a diagram, and run a survey of them with Capt. Craig. Since 1846 the street has been increasing in width in front of these lots, and now is about sixty feet wide at the junction on the line at Warren street; it is probably eighty feet wide.

This being all the evidence introduced by the plaintiff, the defendants, to maintain the issue on their part, introduced and offered in evidence the letters of administration granted to Dickinson B. Morehouse on the estate of Robert P. Guyard, which are in the words and figures following, to wit:

STATE OF ILLINOIS,
*Jo Daviess County, sct.*

The people of the State of Illinois to all to whom these presents shall come, greeting:

Know ye, that whereas Robert P. Guyard, late of the county of Jo Daviess, and State of Illinois, died intestate, as it is said, on or about the 1st day of July, 1854, having, at the time of his decease, goods and chattels and effects in this State, which may be lost, destroyed, or diminished in value, if speedy care be not taken of the same: To the end, therefore, that said property may be collected and preserved for those who shall appear to have a legal right or interest therein, we do hereby appoint Dickinson B. Morehouse, of the county of Jo Daviess, and State of Illinois, administrator of all and singular the goods and chattels, rights, credits, and effects which were of the said R. P. Guyard at the time of his decease, with full power and authority to secure and collect the said property and debts, wheresoever the same may be found in this State, and in general to do and perform all other acts which now are or hereafter may be required of him by law.

Witness John Turney, judge of probate in and for the said county of Jo Daviess, at his office in Galena, this 7th day of March, 1836.

JOHN TURNEY,
*Judge of Probate.*

To the reading of said letters of administration in evidence the *the* plaintiff then and there objected; which objection was overruled by the court, and the same were read to the jury, and the plaintiff excepted.

The defendants then introduced and read as evidence to the jury the same laws of Congress relative to laying off a town on Bean river, and the amendments thereto, which had been previously offered and read by the plaintiff.

The defendants then introduced and examined as a witness Daniel Warm, who testified that John Turney, Samuel Leach, and himself were appointed and acted as the commissioners to settle the

pre-emptions to lots in Galena, under the act of Congress and the amendment thereto that have been read as evidence in this case; that said commissioners had a clerk, and kept a record of their proceedings, and identified the record, being the same in evidence in this case.

That after they organized and appointed Mr. Craig to survey the town, they gave notice for all persons to come in and prove up their claims to lots.

The commissioners proceeded to act under the instructions they had, and complied with the law and the instructions.

We required the party claiming lots to produce and file proof, in writing, showing he was entitled to the same under the law; and if we adjudged the proof sufficient, we granted duplicate certificates, one to be given to the claimants to go to the local land office and enter the lots mentioned therein at the minimum price, the other to be sent to the General Land Office. D. B. Morehouse appeared before the commissioners and filed a claim for himself and as administrator of R. P. Guyard's estate to lots eight and nine now in dispute, and the same was awarded to D. B. Morehouse and the legal representative of Robert P. Guyard by the commissioners. No other person claimed the lots.

The deed offered in evidence was never presented to me, and never before the board or offered in evidence before the commissioners, and I can state, to the best of my recollection, that neither Phelps or any person for him ever offered that deed (the one offered and read by the plaintiff) before the commissioners, and claimed said lots, as I would have remembered the deed if I had ever seen it before.

On cross-examination, this witness stated that there was an award, in the first place, to the legal representatives of R. P. Guyard alone, which was reconsidered, and the final award was to D. B. Morehouse and the legal representatives of Robert P. Guyard; witness does not remember the reason of the *charge*, but supposes additional proof was introduced; the first award may have been entered when only two of the commissioners were present; don't remember who prosecuted the claim when that first entry was made; afterwards, when Mr. Leach came on, they examined them all, and made the final award.

The defendants then offered in evidence and read to the jury the following certificates from the commissioners to adjust the title to lots in Galena:

COMMISSIONER'S OFFICE,
*Galena, Illinois, 20th day of February*, 1838.

We certify that the legal representatives of Robert P. Guyard and Dickinson B. Morehouse are entitled to pre-emption to lot No. eight, fronting forty-seven feet on Water street, and running west-

ward 69 by 79 feet, containing .08 of an acre, and that the same is of the first class.

Given under our hands, date above written.

JOHN JAMES,
DAN'L WANN,
SAM'L LEACH,
*Commissioners.*

COMMISSIONER'S OFFICE,
*Galena, Illinois, 20th day of February*, 1838.

We certify that the legal representatives of Robert P. Guyard and Dickinson B. Morehouse are entitled to a pre-emption to lot No. nine, fronting forty-seven feet on Water street, and running westward fifty-eight by sixty-nine feet, containing 0.67 of an acre, and that the same is of the first class.

Given under our hands the date above written.

JOHN JAMES,
DAVID WANN,
SAM'L LEACH,
*Commissioners.*

The defendant then offered in evidence and read to the jury the following record and proceedings of the General Land Office:

GALENA, *Nov.* 14, 1828.

Mr. R. P. GUYARD and D. B. MOREHOUSE
To JOSEPH TAYLOR, Dr.

To building a wall on lots No. 5 and 6, Wharf row, 122 pr. feet, and 4 feet high, and 3 feet thick, at $2 50 per foot, - - - - - - - - $148 31

Received payment in full,
JOSEPH TAYLOR.

COMMISSIONER'S OFFICE,
*Galena, 22d Nov.*, 1836.

D. B. Morehouse, on his oath, says, in the year 1828 that R. P. Guyard and D. B. Morehouse improved lots originally No. 5 and 6—under present survey, 8 and 9 Wharf row—and paid to Joseph Taylor $148 31 for building a wall on said lots, and possessed the same in the year 1829.

D. B. MOREHOUSE.

Sworn to before the undersigned,
DANIEL WANN,
JOHN JAMES.

Joseph Taylor, on his oath, says that he is acquainted with the

facts set forth in the foregoing bill and affidavit, and that they are both true and correct.

JOSEPH TAYLOR.

Sworn to before the undersigned,

DAN'L WANN,
JOHN JAMES,
*Commissioners.*

COMMISSIONER'S OFFICE,
*Galena, Illinois, 20th day of February*, 1838.

We certify that the legal representatives of Robert P. Guyard and Dickinson B. Morehouse are entitled to a pre-emption to lot No. eight, fronting forty-seven feet on Water street, and running westwardly 69 by 79 feet, containing .08 of an acre, and that the same is of the first class.

Given under our hands the date above written.

JOHN JAMES,
DAN'L WANN,
SAM'L LEACH,
*Commissioners.*

COMMISSIONER'S OFFICE,
*Galena, Illinois, 20th day of February*, 1838.

We certify that the legal representatives of Robert P. Guyard and Dickinson B. Morehouse are entitled to a pre-emption to lot No. nine, fronting 47 feet on Water street, and running westwardly 58 by 69 feet, containing .067 of an acre, and that the same is of the first class.

Given under our hands the day above written.

JOHN TURNEY,
DANIEL WAUN,
SAM'L LEECH,
*Commissioners.*

No. 224. LAND OFFICE,
*Galena, Illinois, 20th day of February*, 1838.

I do hereby certify that the legal representatives of Robert P. Guyard and Dickenson B. Morehouse, according to the certificate of the commissioners *chur* appointed to investigate the title of lots in the town of Galena, are entitled to a pre-emption to lot No. nine, fronting forty-seven feet on Water street, and running westwardly 58 by 69 feet, containing .067 of an acre, and that the same is of the first class.

HENRY B. TRUETT, *Register.*

No. 224. RECEIVER'S OFFICE,
*Galena, Illinois, February 20th*, 1838.

Received from the legal representatives of R. P. Guyard and D.

B. Morehouse, of Jo Daviess county, Illinois, the sum of five dollars cents, being in full payment for lot No. 9, in Water street, containing $\frac{067}{100}$ of an acre, in the town of Galena.

$5 00. JOHN DEMENT, *Receiver*.

No. 224. LAND OFFICE,
*Galena, Illinois, February* 20, 1838.

It is hereby certified, that under the provisions of the act of Congress approved on the 2d day of July, 1836, entitled "An act to amend an act entitled an act authorizing the laying off a town on Bean river, (Fever river,) in the State of Illinois, and for other purposes, approved fifth February, eighteen hundred and twenty-nine," the legal representatives of Robert P. Guyard and Dickenson B. Morehouse, of Jo Daviess county, Illinois, have this day purchased lot numbered nine, fronting 47 feet on Water street, and running westwardly 58 by 69 feet, containing sixty-seven thousandths of an acre, in the town of Galena, for the sum of five dollars, which they have paid in cash to the receiver of public moneys, (it appearing by the certificate No. of the commissioners appointed under the said act that they were entitled to become the purchasers of the said lot, as a pre-emption right, for that sum, it being in the first class of lots.)

Now, know ye, that on the presentation of this certificate to the Commissioner of the General Land Office, the said legal representatives of Robert P. Guyard and Dickenson B. Morehouse shall be entitled to receive a patent for the said lot.

HENRY B. TRUETT,
*Register of the Land Office.*

Endorsed on the preceding certificate of the register is the following certificate of the receiver:

LAND OFFICE,
*Dixon, Ills., July* 18, 1845.

It is hereby certified, that on the fifteenth of February, 1828, the legal representatives of Robert P. Guyard and Dickenson B. Morehouse purchased the within-described lot, as set forth within, for which they shall be entitled to receive a patent, upon presentation of the certificate to the Com'r of the Gen'l Land Office.

JOHN DEMENT, *Receiver*.

No. 225. LAND OFFICE,
*Galena, Illinois, 20th day of July*, 1838.

I do hereby certify that the legal representatives of Robert P. Guyard and Dickenson B. Morehouse, according to the certificate of the commissioners No. appointed to investigate the title to lots in the town of Galena, are entitled to a pre-emption to lot No. eight, fronting forty-seven feet on Water street, and running west-

wardly 69 by 79 feet, containing .08 of an acre, and that the same is of the first class.

HENRY B. TRUETT, *Register*.

No. 225. RECEIVER'S OFFICE,
*Galena, Illinois, February* 20, 1838.

Received from the legal representatives of R. P. Guyard and D. B. Morehouse, of Jo Daviess county, Illinois, the sum of five dollars and cents, being in full payment for lot No. eight, in Water street, containing $\frac{08}{100}$, in the town of Galena.

$5 00. JOHN DEMENT, *Receiver*.

No. 225. LAND OFFICE,
*Galena, Illinois, Feb. 20th*, 1838.

It is hereby certified, that under the provisions of the act of Congress approved on the 2d day of July, 1836, entitled "An act to amend an act entitled an act authorizing the laying off a town on Bean river, (Fever river,) in the State of Illinois, and for other purposes, approved fifth February, eighteen hundred and twenty-nine," the legal representatives of Robert P. Guyard and Dickenson B. Morehouse, of Jo Daviess county, Illinois, have this day purchased lot numbered eight, fronting 47 feet on Water street, and running westwardly 69 by 79 feet, containing eight-hundredths of an acre, in the town of Galena, for the sum of five dollars, which they have paid in cash to the receiver of public moneys, (it appearing by the certificate No. of the commissioners appointed under the said act that they were entitled to become the purchasers of said lot, as a pre-emption right, for that sum, it being in the first class of lots.)

Now, know ye, that on the presentation of this certificate to the Commissioner of the General Land Office, the said legal representatives of Robert P. Guyard and Dickenson B. Morehouse shall be entitled to receive a patent for the said lot.

HENRY B. TRUETT,
*Register of the Land Office*.

Endorsed on the above:

LAND OFFICE,
*Dixon, Ill., July* 18, 1845.

It is hereby certified, that on the 20th of February, 1838, the legal representatives of Robert P. Guyard and Dickinson B. Morehouse purchased the within-described lot, as set forth within, for which they shall be entitled to receive a patent, on presentation of this certificate to the Commissioner of the General Land Office.

JOHN DEMENT, *Receiver*.

GENERAL LAND OFFICE,
*May 3d*, 1856.

I, Thos. A. Hendricks, Commissioner of the General Land Office,

do hereby certify, that the annexed are true and literal exemplifications of the original papers on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

THOS. A. HENDRICKS,
*Commissioner of the General Land Office.*

To the admission of which evidence the plaintiff then and there objected, and the court overruled the objection and admitted said evidence, and the plaintiff excepted.

The defendant then offered in evidence the petition of D. B. Morehouse, as administrator of R. P. Guyard, to the circuit court praying for leave to sell the real estate of the deceased to pay debts against the estate, in the words and figures following, to wit:

To the Hon. the circuit court in and for the county of Jo Davies, in the State of Illinois:

The petition of Dickinson B. Morehouse, of the county of Jo Daviess aforesaid, administrator of all and singular the rights, credits, &c. of Robert P. Guyard, late of said county, deceased, most respectfully represents, that on the 7th day of March instant there was granted to your petitioner, by the judge of probate of the said county, letters of administration in due form upon the estate of said Robert P. Guyard, deceased; that he knows of no personal estate of said Guyard whatsoever, in the said county or elsewhere; nor has your petitioner reason to believe that he died possessed of any; that at the time of his death said Guyard was indebted to the late firm of Guyard, Morehouse & Co., for the use of the assignee of Mour Thomas, of Philadelphia, the sum of 3,255 dollars 75 cents, with interest on the notes, a list of which and when due is hereto annexed, which debt is admitted to be just and due, and is the only claim as yet presented to your petitioner, who further represents, that the only property that he knows of as belonging to said Guyard, in his lifetime, is the claim, title, and right of him, at the time of his death, in and to four town lots in the town of Galena, namely, lot number three (No. 3) of Wharf row so called, granted to said Guyard, by permit dated March 12th, 1828; also, lot number four, (No. 4,) adjoining the above, granted to said Guyard, by permit dated March 23d, 1828.

Also, lot number five (No. 5) in said row, granted April 6th, 1828, by permit, to Nathaniel Johnson, and by him transferred and assigned to *to* said Guyard, December 11, 1828; also, lot number six (6) adjoining the above, granted by permit, dated September 18, 1828, to John Ward, and by him transferred, November 29th, 1828, to said R. P. Guyard, all which in relation to said lots will more fully and at large appear by reference to the book of permits, and the survey of the lots in said town of Galena.

Your petitioner further represents, that said Robert P. Guyard died without leaving any widow, child or children, or devisees, to his knowledge, to serve any notice of their appliction upon, but he has given public notice, as the law requires, in the nearest newspaper (a copy of which is annexed) of his intention of the present application; in consideration of all which facts, hereinbefore stated, he prays the aid of this court in the premises: that you will order and decree a sale of the right, title, claim, and interest of said Robert P. Guyard in and to the town lots thereinbefore described, for the payment of the debts of said estate, according to the statute in such case made and provided, &c.

D. B. MOREHOUSE,
*Adm'r, &c.*

List of notes given to Guyard, Morehouse & Co. by Robert P. Guyard, viz:—all dated at Galena, September 22d, 1829.

| | | |
|---|---|---|
| 1st due Nov., 1830, | for..... | $500 00 |
| 2d due Nov., 1830, | " ..... | 500 00 |
| 3d due Nov., 1831, | " ..... | 255 75 |
| 4th due June, 1832, | " ..... | 500 00 |
| 5th due Nov. 3, 1832, | " ..... | 500 00 |
| 6th due Nov. 3, 1833, | " ..... | 500 00 |
| 7th due June 3, 1834, | " ..... | 500 00 |
| | | $3,255 75 |

With interest thereon from the time they became respectively due.

D. B. MOREHOUSE,
*Admr.*

Endorsed: Filed August 15th, 1836. S. Smoker, clerk.

Also there is written thereon as follows:

STATE OF ILLINOIS,
*Jo Daviess County, sct:*

I do hereby certify, that Dickinson B. Morehouse has been duly appointed administrator of the estate of Robert P. Guyard, deceased. Given under my hand and seal this 18th day of August, 1836.

JOHN TURNEY, [SEAL.]
*Late Judge of Probate.*

To the admission of which evidence (as the defendants did not propose to follow up the evidence and show that any order was made, or any further proceedings had) the plaintiff then and there objected; the court overruled the objection and allowed the petition to be read as evidence to the jury, and the plaintiff then and there excepted.

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The defendants then offered and read in evidence to the jury the depositions of Wm. Hempstead, and the patents for lots eight and nine, as follows:

STATE OF ILLINOIS,
*Jo Daviess County, ss:*

PHELPS vs. SMITH. } Ejectment.

In circuit court, said county.

Charles S. Hempstead, being duly sworn, states, that Wm. Hempstead is a witness in the above cause, and this affiant is informed and believes that he is about to depart this State and will not be here at the next term of this court; he therefore desires to have his deposition taken according to the statute in such case made and provided.

CHAS. HEMPSTEAD.

Subscribed and sworn before me this 12th October, 1853.

WM. C. BOSTWICK, *J. P.*

PHELPS vs. SMITH. } Ejectment in J. D. co., Ill.

To Stevens and Johnson, atty's for plaintiff in said cause of Phelps vs. Smith.

Take notice, that on Tuesday, the 25th day of October, 1853, I shall take the deposition of Wm. Hempstead, a witness for the defendant in the above cause, before Wm. C. Bostwick, esqr., a justice of the peace in and for the said county, between the hours of nine in the morning and six in the evening of the said day; you can then and there attend and cross-examine if you see proper.

WASHBURNE,
*Att'y for Smith, Deft.*

Endorsed: Accepted service of the within October 14th, 1853.
J. P. STEVENS.

Deposition of William Hempstead, of Jo Daviess county, in the State of Illinois, a witness produced, sworn, and examined before William C. Bostwick, a justice of the peace in and for said county, at his office in Galena, in said county, between the hours of 9 o'clock in the morning and 6 o'clock in the evening, on the 25th day of October, 1853, in pursuance of the annexed notice, to be used if need be in the trial of a certain cause depending in the circuit

court of said court, wherein William A. Phelps is plaintiff, and Bradner Smith defendant, in ejectment, on the part and behalf of defendant.

William Hempstead, of lawful age, being first duly sworn, deposes and says in answer to—

Interrogatory 1st. Are you acquainted with Dickinson B. Morehouse, formerly residing in Galena? If yea, how long have you known him?

Answer. I have known said Dickinson B. Morehouse ever since the year 1828.

Question 2d. Have you ever acted as agent for said D. B. Morehouse, and did you procure for him certain patents from the land office at Dixon? If so, when, and for what lots?—state all you know about it.

Answer. I have acted as the general agent of said Dickinson B. Morehouse since the year 1840; and while acting as his agent he left with me a number of duplicate receipts of the receiver of the land office for the district of lands subject to sale at Dixon, Galena, Illinois, upon which I received the patents, and amongst which was one for lot No. three, (3,) on Main and Water streets in the late town of Galena, to the legal representatives of Robert P. Guyard, which patent is here now shown to me, which I annex hereto, and mark it with the letter "A," to be taken as part of this my deposition.

Also, one other patent issued to the legal representatives of said Robert P. Guyard, for lot No. seven, (7,) on Water street, in the late town of Galena, and which said patent is now shown to me, and by me hereto annexed, marked letter "B," and to be taken as part of this my deposition.

Also, one other patent to the legal representatives of said Robert P. Guyard and Dickinson B. Morehouse, for lot No. eight, (8,) on Water street, in the late town of Galena, and here now shown to me, and hereunto annexed, and marked letter "C," and to be taken as part of this my deposition. And also, one other patent, issued to the legal representatives of said Robert P. Guyard and Dickinson B. Morehouse, for lot No. nine, (9,) on Water street, in the late town of Galena, and now here shown to me, and hereunto annexed, and marked "D," and to be taken as part of this my deposition.

All of which said patents I received from said land office at Dixon, Illinois, with the duplicate receipts of the receiver for said lots. I also deposited or left with the then receiver of the land office at Dixon the duplicate pre-emption certificate for said lots, signed by the commissioner, all of which I received from said Dickinson B. Morehouse for the purpose of procuring from the land office the patent for said lots for said Dickinson B. Morehouse.

WM. HEMPSTEAD.

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STATE OF ILLINOIS,
*Jo Daviess County, ss:*

I, William C. Bostwick, acting as a justice of the peace in and for said county, do certify that the above deposition was taken by me at the time and place mentioned in the caption thereof; that the said witness was first duly sworn, and that the same was carefully read to said witness, and signed by him, and that he was then again finally sworn thereto.

Witness my hand this 25th day of October, A. D. 1853.

WM. C. BOSTWICK, *J. P.*

OCTOBER 31, 1853.

The deposition having been closed before the hour fixed upon for same, by consent of parties, the attorney of the plaintiff not having been present when the direct interrogatories were propounded, the same are opened, and Isaac P. Stevens, attorney for the plaintiff, propounds to said witness the following cross-interrogatories, to wit:

The said attorney objects to all that part of the answer of witness to 2d interrogatory in chief that relates to lot No. 7 or to patent for same.

Question 1st. Where does Dickenson B. Morehouse now reside, or is he stopping in Galena?

Answer. I do not know where he now resides. His family are in Galena at present, and I understand that he intends to make Galena his residence.

Question 2d. In acting as the agent for D. B. Morehouse, did you ever act for him as administrator of any estate? and if so, of what estate, and at what time?

Answer. I once paid for him, as administrator of Robert P. Guyard's estate, some money, which I charged to the individual account of said Morehouse, but do not recollect the time, not even the year, in which same was paid. I never acted generally as agent for him as administrator of any estate. This payment was made many years ago.

Question 3d. In paying the money, as stated in your last answer, did you do so at the special request of said Morehouse, or did you act in the matter and then inform him of what you had done?

Answer. I had no special instructions from him on the subject, nor did I inform him at the time; but the said amount paid for him as aforesaid by me was repaid by him afterwards in settlement of our accounts.

Question 4th. Did you ever procure from the Dixon land office patents for any other persons than Dickenson B. Morehouse? and if so, how often have you so acted, and how many patents procured for other persons than yourself?

Answer. I have procured from said land office patents for other persons than said D. B. Morehouse; cannot say how often, or for how many persons.

Question 6th. State, if you can, whether the times that you have thus acted in procuring patents for other persons was once or twice, few or many?

Answer. I have but very seldom procured patents for land from the Dixon land office unless I was interested in the land directly or indirectly; I can't say how many; can't say whether once or twice, or how many.

Question 6. Have you ever owned or claimed any part of lots 8 and 9, in controversy in this suit; or have you any interest, either directly or indirectly in the event of this suit?

Answer. Not that I know of. I have no interest in the result of this suit.

WM. HEMPSTEAD.

THE STATE OF ILLINOIS,
*Jo Daviess County*, ss.

I, the undersigned, justice of the peace in and for said county, do certify that the foregoing deposition of William Hempstead, on cross-examination, was taken before me on the 31st day of October, 1853, by consent of parties; that said Hempstead was first duly sworn, and that said cross-examination was reduced to writing by me, and that same was carefully read to said witness, and signed by him, and that he was then finally sworn thereto.

Witness my hand this 31st day of October, 1853.

WM. C. BOSTWICK, *J. P.*

The patents referred to in the annexed depositions of Wm. Hempstead are as follows.

One marked "A," referred to, is as follows, to wit:

*Receiver's receipt and Register's certificate No.* 223.

The United States of America, to all to whom these presents shall come, greeting:

Whereas the legal representatives of Robert P. Guyard, of Jo Daviess county, Illinois, have deposited in the General Land Office of the United States a certificate of the register of the land office at Galena, whereby it appears that full payment has been made by the said legal representatives of Robert P. Guyard as aforesaid, according to the provisions of the act of Congress of the 2d day of July, 1836, entitled An act to amend an act entitled an act authorizing the laying off a town on Bean river, (Fever river,) in the State of Illinois, and for other purposes, approved fifth February, 1829, for lot number three, on Main and Water street, containing eight-hundredths of an acre, in the town of Galena, according to the official plat of the survey of the said town, returned to the General Land Office, which said lot has been purchased by the said legal representatives as aforesaid:

1736

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said legal representatives as aforesaid, and to their heirs, the said lots above described, *the said lots above described:* to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said legal representatives as aforesaid, and to their heirs and assigns forever.

In testimony whereof, I, James K. Polk, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be affixed, at the city of Washington, the first day of January, in the year of our Lord one thousand eight hundred and forty-six, and of the independence of the United States the seventieth.

[SEAL.] JAMES K. POLK,
By J. KNOX WALKER, *Sec'y*.

Recorded vol 1, page 223.

S. H. LAUGHLIN,
*Recorder of the General Land Office.*

Marked (B.) Patent.

*Receiver's receipt and Register's certificate No.* 222.

The United States of America, to all to whom these presents shall come, greeting:

Whereas the legal representatives of Robert P. Guyard, of Jo Daviess county, Illinois, have deposited in the General Land Office of the United States a certificate of the register of the land office at Galena, whereby it appears that full payment has been made by the said legal representatives of Robert P. Guyard as aforesaid, according to the provisions of the act of Congress of the 2d day of July, 1836, entitled An act to amend an act entitled an act authorizing the laying off a town on Bean river, (Fever river,) in the State of Illinois, and for other purposes, approved fifth February, 1829, for lot numbered seven, on Water street, containing nine-hundredths of an acre, in the town of Galena, according to the official plat of the survey of the said town, returned to the General Land Office, which said lot has been purchased by the said legal representatives as aforesaid:

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said legal representatives as aforesaid, and to their heirs, the said lot above described:

to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said legal representatives as aforesaid, and to their heirs and assigns forever.

In testimony whereof, I, James K. Polk, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the first day of January, in the year of our Lord one thousand eight hundred and forty-six, and of the independence of the United States the seventieth.

By the President:

[SEAL.] JAMES K. POLK,
By J. KNOX WALKER, *Sec'y*.

Recorded vol. 1, page 22.

S. H. LAUTHLIN,
*Recorder of the General Land Office.*

Patent marked "C" is as follows:

*Receiver's receipt and Register's certificate No.* 225.

The United States of America to all to whom these presents shall come, greeting:

Whereas the legal representatives of Robert P. Guyard and Dickinson B. Morehouse, of Jo Daviess county, Illinois, have deposited in the General Land Office of the United States, a certificate of the register of the land office at Galena, whereby it appears that full payment has been made by the said legal representatives as above named, according to the provisions of the act of Congress of the 2d day of July, 1836, entitled an act to amend an act entitled an act authorizing the laying off a town on Bean river, Fever river, in the State of Illinois, and for other purposes, approved fifth February, 1829, for lot numbered eight, fronting forty-seven feet on Water street, and running westwardly sixty-nine by seventy-nine feet, containing eight-hundredths of an acre, in the town of Galena, according to the official plat of the surveys of the said town, returned to the General Land Office, which said lot has been purchased by the said representatives of Robert P. Guyard and Dickinson B. Morehouse:

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such [case] made and provided, have given and granted, and by these presents do give and grant, unto the said representatives of Robert P. Guyard and Dickinson B. Morehouse, and to their heirs, the said lot above described: to have and to hold the same, together with all the rights, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said

representatives of Robert P. Guyard and Dickinson B. Morehouse, and to their heirs and assigns forever, as tenants in common, and not as joint tenants.

In testimony whereof, I, James K. Polk, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the first day of January, in the year of our Lord one thousand eight hundred and forty-six, and of the independence of the United States of America the seventieth.

By the President:

[SEAL.] JAMES K. POLK,
By J. KNOX WALKER,
*Secy.*

Recorded vol. 1, page 225.

S. H. LAUGHLIN,
*Recorder of the General Land Office.*

Patent marked "D" is as follows, to wit:

*Receiver's receipt and Register's certificate.*

The United States of America to all whom these presents shall come, greeting:

Whereas the legal representatives of Robert P Guyard and Dickinson B. Morehouse, of Jo Daviess county, Illinois, have deposited in the General Land Office of the United States a certificate of the register of the land office at Galena, whereby it appears that full payment has been made by the said legal representatives as above named, according to the provisions of the act of Congress of the 2d day of July, 1836, entitled an act to amend an act entitled an act authorizing the laying off a town on Bean river (Fever river) in the State of Illinois, and for other purposes, approved fifth February, 1829, for lot numbered nine, fronting forty-seven feet on Water street, and running westwardly fifty-eight by sixty-nine feet, containing sixty-seven thousandths of an acre, in the town of Galena, according to the official plat of the survey of the said town, returned to the General Land Office, which said lot has been purchased by the said representatives of Robert P. Guyard and Dickinson B. Morehouse, as aforesaid:

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said representatives of Robert P. Guyard and Dickinson B. Morehouse, and to their heirs, the said lot above described: to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the

said representatives of Robert P. Guyard and Dickinson B. Morehouse, and to their heirs and assigns forever, as tenants in common, and not as joint tenants.

In testimony whereof, I, James K. Polk, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the first day of January, in the year of our Lord one thousand eight hundred and forty-six, and of the independence of the United States the seventieth.

By the President :

JAMES K. POLK,

By J. KNOX WALKER, *Sec'y.*

Recorded vol. 1, page 224.

S. H. LAUGHLIN,

*Recorder of the General Land Office.*

The defendants then introduced and examined Chas. S. Hempstead as a witness, who testified that he had acted as the agent and attorney of D. B. Morehouse, one of the defendants, and, as such attorney, had made out the petition for him, as administrator of R. P. Guyard's estate, asking for the sale of these lots among others. Witness is the owner of the other half of these lots in controversy.

For several years ago these lots were a mud-hole. I leased them many years ago, and have had charge and possession, and have drawn the rent ever since of these lots. Since the first corporation tax was paid, in 1836, I have paid the taxes and drawn the rent up to the present time for Morehouse, as administrator of R. P. Guyard's estate. The plaintiff in this case was the first man to dispute the title of the lots in 1847.

I was acting for Morehouse, as administrator of Guyard. The lots have always been in my possession, for myself, and as agent of Morehouse, as adm'r of Guyard, and are now in my possession.

I was frequently before the commissioners, for myself and others. I know that Morehouse represented lot eight and nine before the commissioners.

The defendant then offered and read in evidence the following notices in Gazette:

"The commissioners appointed" to investigate claims to lots in the town of Galena, have appointed the 8th of April next to close their *commissioner*, and request all the claimants to come forward and have their claims adjusted prior to the above date.

DANIEL WANN,

JOHN TURNEY,

*Commissioners.*

COMMISSIONER'S OFFICE, *Oct. 5th*, 1836.

Ordered by the board that public notice be given that the com-

missioners will be prepared to receive testimony on Monday, the 17th instant, relative to claims to lots from No. 1 on the prairie to No. 46; and on Monday, the 24th instant, on all the lots between Main and Bench streets, as far as Moses Meeker's garden; and on Monday, the 31st instant, on all other lots included in the old survey within the limits of Galena, and that the board will sit from day to day until the testimony is completed.

JOHN TURNEY,
DANIEL WANN.

The defendants then offered and read in evidence a lease of the said lots to Bradner Smith, which is as follows:

This indenture, made this thirty-first day of July, A. D. 1851, between Charles Hempstead, for himself, and as agent of D. B. Morehouse, late of Galena, Illinois, and Bradner Smith, of same place, witnesseth: That the said C. S. Hempstead and D. B. Morehouse, for the consideration hereinafter expressed, doth hereby devise and lease unto the said Bradner Smith three certain lots of ground in the city of Galena, to wit, lots eight, (8,) nine, (9,) north half of No. seven, (7,) all in block B, on west side of the river, as designated on plat of survey of said city: to hold for the term of one year and three months from the date hereof, yielding and paying therefor, at the end of every three months during the said term, unto the said Hempstead and Morehouse, or their assigns, the sum of eighteen $\frac{75}{100}$ dollars during the continuance of this lease; and the said Bradner Smith covenants to pay the said rent in manner aforesaid, and *and* deliver up the said premises to the said Hempstead and Morehouse, or their attorney, peaceably and quietly, at the end of the said term, in as good condition as the same now are or may be put into by the said Bradner Smith, reasonable use and wear and tear, and fire and other casualty, excepted: Provided, always, and these presents are upon the express condition, that if the said rent or sum of eighteen $\frac{75}{100}$ dollars, *are* any part thereof, shall be behind and unpaid for the space of ten days next after the said term of payment wherein the same is appointed to be paid as aforesaid, or if the said Bradner Smith sublease the said premises without the consent of said Hempstead and Morehouse, as hereinafter provided, that then, and in either of said cases, it shall and may be lawful for said Hempstead and Morehouse, their heirs and assigns, into the said premises to re-enter, and the same to have again, repossess, and enjoy, and anything herein to the contrary thereof notwithstanding. And it is further agreed by the parties hereto that the said Bradner Smith, his executor and administrator, shall not nor will, at any time or times during said term, assign or set over, underlease or underlet said demised premises, or in any manner part with the occupation or possession of the same without the special license and consent of said C. S. Hempstead and D. B.

Morehouse, their heirs or assigns, in writing, under his or their hands and seals, first had and obtained.

In witness whereof we have hereunto set our hands and seals the day and year first above written.

P. SMITH, [SEAL.]
C. S. HEMPSTEAD, [SEAL.]
D. B. MOREHOUSE, [SEAL.]
C. S. HEMPSTEAD, *Ag't*, [SEAL.]

| | | |
|---|---|---|
| 1852. March 2.—By cash | | $18 75 |
| Aug't 19. " acor | | 24 00 |
| | | $42 75 |
| " " due bill to Aug't | | 32 25 |
| | | $75 00 |
| March 31, 1853.—Paid in full to 1 Nov., 1852 | | $18 75 |

This being all the evidence (with the original maps of the town of Galena) on the trial of said cause on the part of the plaintiff and defendants respectively—

The plaintiff then asks the court to instruct the jury as follows:

If they believe, from the evidence in this cause, that Guyard, by his deed in 1829, sold and transferred all his interest to Phelps, the plaintiff, in wharf lots 5 and 6 of old survey, and that lots 8 and 9 of the present survey was granted by the commissioners in the place of lots 5 and 6, (a part of which was taken for Water street;) and if they further believe from the evidence that Phelps, under the deed from Guyard, is the legal representative, and the defendant, Smith, was in the possession of said lots 8 and 9 at the time of bringing this suit, then the jury should return a verdict for the plaintiff.

Given.

If the jury believe from the evidence that Guyard, by his deed in 1829, transferred all his interest in the lots in controversy to plaintiff, and that Guyard had no estate, interest, or property in the lots in controversy after the date of his deed to the plaintiff in 1829, then the right of Guyard, which had been sold and transferred by him to the plaintiff, could not ripen into a legal title in favor of Guyard's heirs or administrators; they could only derive from Guyard such right or claim as Guyard himself had in said lots.

Given.

If the jury believe from the evidence that lots 5 and 6 were conveyed by Guyard's deed of 1829 to the plaintiff, and by virtue of occupation and improvements of said lots 5 and 6 of old survey a pre-emption was granted by the commissioners to the legal repre-

sentatives of said Guyard, and an entry made in the land office at Dixon of lots 8 and 9 of present survey by the legal representatives of Guyard to the undivided half of lots 8 and 9, and that Phelps, the plaintiff, under Guyard's deed in the legal representatives to whom said lots was awarded, then the legal title of the plaintiff to the undivided half of lots 8 and 9 is made out; and if the jury further believe that Smith was in possession of said lots at the time of bringing this suit, then the jury should find a verdict for the plaintiff.

Given.

The plaintiff asks the court to instruct the jury—

1. That if the jury believe from the evidence that lots eight and nine, as mentioned in the plaintiff's declaration, was awarded by the commissioners to the legal representatives of Robert P. Guyard and Dickinson B. Morehouse, in the place of old lots five and six, in Wharf row; and if the jury further believe Phelps, the plaintiff, is the grantee and "legal representative" of Robert P. Guyard to the undivided half of said lots, and that the defendant was in the possession of the lots at the commencement of this suit, then the jury will find for the plaintiff.

Given.

2d. That the decision of the supreme court of this State of Illinois, until the same is reversed and annulled, is of binding effect, and this court and jury are bound by said decision.

Given.

3d. If the jury believe from the evidence that Guyard executed to the plaintiff a deed of the lots in controversy in 1829, and that Guyard had no estate, interest, or property in the lots in controversy after the execution of his deed in 1829, but that the right thus transferred passed all his interest in said lots to the plaintiff, and that said lots to the plaintiff *and that said lots* had been awarded by the commissioners to the "legal representatives" of said Guyard, and that Phelps, as grantee under said deed, is the legal representative of said Guyard, then the jury will find for the plaintiff.

Given.

4th. If the jury believe from the evidence that the right of pre-emption to the undivided half of lots eight and nine of the present survey was granted by the commissioners by virtue of improvements and occupation of lots five and six, in Wharf row, of old survey, then the action of commissioners in favor of the "legal representatives" of said Guyard as to the right of pre-emption to the undivided half of lots 8 and 9 of present survey is conclusive; and if the jury further believe from the evidence that the plaintiff, Phelps, under Guyard's deed to him, is the "legal representative," and that said lots were entered from the General Government under and by virtue and in conformity to the award made by the commissioners, then a legal title rested in Phelps, notwithstanding Morehouse's agent may have received the patent from the Land

Office; but the law will intend he received it for Phelps, and they will find for the plaintiff.

Given.

5th. If the jury believe from the evidence that Guyard was entitled to a pre-emption, and that he sold and transferred interest in said lots 8 and 9 to the plaintiff, Phelps, in 1829, and afterwards the commissioners awarded and the Government issued the patent to the legal representatives of said Guyard, then Phelps, as grantee of Guyard, is the legal representative, and the jury should find for the plaintiff.

Given.

6th. The legal representatives, as used in this law, is the party in interest whose identity was uncertain, and who succeeded to the rights of Guyard. It means the party who legally represents the interest which was once vested in Guyard, and by virtue of which right the law authorized the lots to be entered; and if the jury believe from the evidence that Guyard was entitled to a pre-emption to the lots in controversy, and parted with all his interest to Phelps by his deed in 1829, then Phelps is the legal representative, and the jury should find for the plaintiff.

Given.

To the giving of which instructions by the court, the defendants then and there objected, and excepted.

The defendants then asked the court to instruct the jury as follows:

WILLIAM A. PHELPS
vs.
BRADNER SMITH et al.

The defendants by their counsel pray the court to instruct the jury as follows:

1st. That the true construction of the act of Congress of the 5th of February, 1829, in its second section, is, that the terms "legal representative or representatives" used in said section mean such person or persons as may be the administrator or administrators, executor or executors of the party who may before have obtained from the agent of the United States a permit to occupy any of the lot or lots in the town of Galena, (the town named in the act,) or who shall have actually occupied and improved any such lot or lots situated within the tract of land authorized by the act to be laid off into lots, and that such person and no other was authorized, under such permit or occupation and improvement, to purchase under that section; and that consequently, if the jury find that the defendant, Dickinson B. Morehouse, was the administrator of Robert P. Guyard mentioned in the evidence, and that there never was any other administrator or executors of said Guyard, and that he, as such administrator, paid the purchase-money for the lots in dis-

pute to the receiver at Galena, and obtained from him a receipt for the same, and a certificate of purchase for such lots, and that these were transmitted to the General Land Office, and a patent issued accordingly; that then the said defendant has title to the lots under said act, and its supplement of the 2d July, 1836, and that therefore the plaintiff is not entitled to recover.

Given.

2d. That if the jury find from the evidence that Dickenson B. Morehouse was, as stated in the first instruction, the sole administrator of Guyard, and that in that capacity he claimed, before the commissioners appointed under the supplementary act of the 2d July, 1836, to be entitled to the lots in dispute by pre-emption title, and that the said commissioners heard and considered all the evidence offered in support thereof, and that neither the plaintiff nor any other person ever claimed the same before said commissioners at any time; and if they further find that the commissioners did thereupon decide said administrator to be entitled to said lots as the legal representative of Guyard, and did file with the register and receiver at Galena the testimony in this case, together with their certificate in favor of said administrator, and that he did thereupon, and as administrator of Guyard, pay the purchase-money for said lots to such receiver, and obtain his receipt therefor, and his certificate of purchase, and that these were by him transmitted to the General Land Office, and the patents issued offered in evidence by said defendants was sent to him, and have been in his possession ever since, claiming to be owner of the lots therein mentioned, and that these are the lots in dispute in this case,—that then the said defendant is the owner of said lots by virtue of said facts, and according to the construction of the said acts of Congress of the 5th February, 1829, and the 2d July, 1836, and that therefore the plaintiff is not entitled to recover.

Given.

Endorsed.

Which said instructions were refused by the court; to the refusing to give instructions by the court the defendants then and there excepted; and afterwards, and *offer* a short absence, the jury returned the following verdict:

We, the jury, find the defendants guilty of unlawfully withholding the possession of the undivided half of lots 8 and nine, as described in the plaintiff's declaration, and find the estate established in the plaintiff to be an estate in fee; and we also assess his damage for withholding the premises at $184 37½.

(Signed) Wm. Hogan, Orson A. Hunt,
Alxr. McKillups, J. D. Glidden,
Jerrey Holeman, Wm. DeCamp,
Henry Vanvoltenberg, James Lawrence,
Ludwig Lersch, Charles Woodham,
James Martin, David James.

Office; but the law will intend he received it for Phelps, and they will find for the plaintiff.

Given.

5th. If the jury believe from the evidence that Guyard was entitled to a pre-emption, and that he sold and transferred interest in said lots 8 and 9 to the plaintiff, Phelps, in 1829, and afterwards the commissioners awarded and the Government issued the patent to the legal representatives of said Guyard, then Phelps, as grantee of Guyard, is the legal representative, and the jury should find for the plaintiff.

Given.

6th. The legal representatives, as used in this law, is the party in interest whose identity was uncertain, and who succeeded to the rights of Guyard. It means the party who legally represents the interest which was once vested in Guyard, and by virtue of which right the law authorized the lots to be entered; and if the jury believe from the evidence that Guyard was entitled to a pre-emption to the lots in controversy, and parted with all his interest to Phelps by his deed in 1829, then Phelps is the legal representative, and the jury should find for the plaintiff.

Given.

To the giving of which instructions by the court, the defendants then and there objected, and excepted.

The defendants then asked the court to instruct the jury as follows:

WILLIAM A. PHELPS
vs.
BRADNER SMITH et al.

The defendants by their counsel pray the court to instruct the jury as follows:

1st. That the true construction of the act of Congress of the 5th of February, 1829, in its second section, is, that the terms "legal representative or representatives" used in said section mean such person or persons as may be the administrator or administrators, executor or executors of the party who may before have obtained from the agent of the United States a permit to occupy any of the lot or lots in the town of Galena, (the town named in the act,) or who shall have actually occupied and improved any such lot or lots situated within the tract of land authorized by the act to be laid off into lots, and that such person and no other was authorized, under such permit or occupation and improvement, to purchase under that section; and that consequently, if the jury find that the defendant, Dickinson B. Morehouse, was the administrator of Robert P. Guyard mentioned in the evidence, and that there never was any other administrator or executors of said Guyard, and that he, as such administrator, paid the purchase-money for the lots in dis-

pute to the receiver at Galena, and obtained from him a receipt for the same, and a certificate of purchase for such lots, and that these were transmitted to the General Land Office, and a patent issued accordingly; that then the said defendant has title to the lots under said act, and its supplement of the 2d July, 1836, and that therefore the plaintiff is not entitled to recover.

Given.

2d. That if the jury find from the evidence that Dickenson B. Morehouse was, as stated in the first instruction, the sole administrator of Guyard, and that in that capacity he claimed, before the commissioners appointed under the supplementary act of the 2d July, 1836, to be entitled to the lots in dispute by pre-emption title, and that the said commissioners heard and considered all the evidence offered in support thereof, and that neither the plaintiff nor any other person ever claimed the same before said commissioners at any time; and if they further find that the commissioners did thereupon decide said administrator to be entitled to said lots as the legal representative of Guyard, and did file with the register and receiver at Galena the testimony in this case, together with their certificate in favor of said administrator, and that he did thereupon, and as administrator of Guyard, pay the purchase-money for said lots to such receiver, and obtain his receipt therefor, and his certificate of purchase, and that these were by him transmitted to the General Land Office, and the patents issued offered in evidence by said defendants was sent to him, and have been in his possession ever since, claiming to be owner of the lots therein mentioned, and that these are the lots in dispute in this case,—that then the said defendant is the owner of said lots by virtue of said facts, and according to the construction of the said acts of Congress of the 5th February, 1829, and the 2d July, 1836, and that therefore the plaintiff is not entitled to recover.

Given.

Endorsed.

Which said instructions were refused by the court; to the refusing to give instructions by the court the defendants then and there excepted; and afterwards, and *offer* a short absence, the jury returned the following verdict:

We, the jury, find the defendants guilty of unlawfully withholding the possession of the undivided half of lots 8 and nine, as described in the plaintiff's declaration, and find the estate established in the plaintiff to be an estate in fee; and we also assess his damage for withholding the premises at $184 37½.

(Signed) Wm. Hogan, Alxr. McKillups, Jerrey Holeman, Henry Vanvoltenberg, Ludwig Lersch, James Martin, Orson A. Hunt, J. D. Glidden, Wm. DeCamp, James Lawrence, Charles Woodham, David James.

Whereupon the defendants moved the court for a new trial, and filed the following reason, to wit:

In the circuit court, at the Oct. term, A. D. 1856.

WM. A. PHELPS,
vs.
B. SMITH and D. B. MOREHOUSE.

Now at this day come the defendant, by Washburne, Weighly, & Jewett, and move the court for a new trial in this cause, for the following reasons:

1. The verdict is against the evidence and the weight of evidence.

2d. The court gave improper instructions to the jury at the instance of the plaintiff.

3d. The court refused the instructions of the defendants, which should have been given to the jury.

WASHBURNE, WEIGHLY, & JEWETT,
*Att'ys for defts.*

And the plaintiff then and there, by leave of the court, entered a remittitur for the damages found by the jury, which motion for a new trial was overruled by the court; to which ruling and decision by the court in overruling said motion for a new trial the defendants then and there excepted.

And thereupon the plaintiff moved the court for judgment on the verdict of the jury; which judgment is in the words and figures following, to wit:

WILLIAM A. PHELPS
vs.
BRADNER SMITH and
Dickenson B. Morehouse. } Ejectment.

Now at this day comes the plaintiff, by his attorney, and enters a remittitur for the sum of one hundred and eighty-four dollars and thirty-seven and one-half cents, and now came on to be heard the motion heretofore filed by the defendants by their att'y for a new trial herein, which motion, after argument, is overruled by the court; to which ruling and decision of the court the defendants, by their att'y, excepts, and the plaintiff, by his att'y, moves the court for judgment upon the verdict of the jury heretofore entered. It is thereupon considered by the court that the plaintiff have and recover possession of said land and premises, to wit: the undivided half of lot number nine, (9,) and the undivided half of lot number eight, (8,) said lot eight fronting forty-seven feet, more or less, on Water street, and running westwardly sixty-nine by seventy-nine feet, more or less, containing .08-100 of an acre, be the same more

or less, and said lot nine fronting forty-seven feet, more or less, on said Water street, and running westerly fifty-eight by sixty-nine feet (58 by 69) containing .077-100 of an acre, more or less, known and designated on the plat of the late town, now city of Galena, said premises being situated in the county of Jo Daviess, and State of Illinois; and it is further considered by the court that the plaintiff have and recover of the defendants his costs by him about his suit in this behalf expended, and that execution issue therefor. And the defendants, by their attorney, prays an appeal to the supreme court, which is granted, conditioned that said defendants file an appeal bond with the clerk, with Charles S. Hempstead as security, in the sum of one thousand dollars, in thirty days from the rising of the court.

And the defendants then and there excepted, and prayed that their bill of exceptions may be signed and sealed by the court in pursuance to law.

Which is accordingly done.

BENJ. R. SHELDON, [SEAL.]

STATE OF ILLINOIS,
*Jo Daviess County, ss.*

I, Wm. R. Rowley, clerk of the circuit court in and for the county and State aforesaid, hereby certify the foregoing to be a true and correct transcript from the records and papers on file in my office of all the proceedings which were had in the said circuit [court,] in the aforesaid case of Wm. A. Phelps vs. Bradner Smith et al., since the return of the same to this court from the supreme court of Illinois.

In testimony whereof I have hereunto set my name and affixed the seal of said court at my office in Galena, this 15th day of April, A. D. 1857.

[SEAL.]

Attest: WM. R. ROWLEY, *Clerk.*

Said transcript of record of which the foregoing [is a copy] is endorsed as follows, to wit: "Filed April 18, 1857. L. Leland, clerk."

Be it further remembered, that afterwards, to wit, on the thirtieth day of April, A. D. 1857, the same being one of the days of the April term of said supreme court within and for the division and State aforesaid, A. D. 1857, Morehouse, the appellant aforesaid, by his counsel, filed in the office of the clerk of said supreme court, in the foregoing entitled cause, his assignment of errors, which said assignment of errors is in the words and figures following, to wit:

In the supreme court of State of Illinois, third grand division of the term of April, A. D. 1857.

DICKINSON B. MOREHOUSE
vs.
WILLIAM A. PHELPS.
} Appeal from Jo Daviess.

And now comes the said appellant, by Washburne, his attorney, and says, that in the record of the proceedings aforesaid, and in the rendition of the judgment aforesaid, manifest error hath intervened to his prejudice in this, to wit:

1st. That it appears by the record aforesaid that the said circuit court erred in admitting improper evidence, offered by the said appellee, on the trial of the said cause before the jury aforesaid.

2d. That it appears by the said record that the said circuit court erred in rejecting proper evidence, offered by the said appellant, upon the trial of the said issue before the jury aforesaid.

3d. That it appears by the said record that the said circuit court erred in giving each and every of the appellee's instructions aforesaid to the jury aforesaid upon the trial of the said issue.

4th. That it appears by the record aforesaid that the said circuit court erred in refusing the instructions aforesaid, asked on the part of the said appellant, to the jury aforesaid.

5th. That it appears by the record aforesaid that the said circuit court erred in overruling the motion of the said appellant for a new trial in the cause aforesaid.

6th. That it appears by the record aforesaid that the said circuit court erred in rendering judgment upon the verdict aforesaid in favor of the said appellee, when, by the laws of the land, said judgment ought to have been in favor of the said appellant.

And this the said appellant is ready to verify by the record aforesaid, &c. Wherefore he prays that the said judgment may be reversed, annulled, set aside, and for nothing esteemed, &c.

WASHBURNE, *p. q.*

Endorsed: "Morehouse vs. Phelps." "Assg't of errors." Filed April 30, 1857. L. Leland, clerk.

And afterwards, to wit, on the day and year last aforesaid, the said Phelps, by his counsel, filed in the clerk's office of said supreme court, in the foregoing entitled cause, his joinder in error, which said joinder in error is in the words and figures following, to wit:

MOREHOUSE
vs.
PHELPS.
} Supr. court, April term, 1857.

And now, at this day, comes the said defendant in error, and for joinder thereto says, there is no error in the records and proceedings as the same appears of record, and that the judgment and pro-

ceedings of the circuit court should be affirmed in all things, wherefore he prays judgment, &c.

M. Y. JOHNSON,
*For Deft. in Error.*

Endorsed: "Morehouse vs. Phelps." "Joinder." "Filed Apr. 30, 1857." L. Leland, clerk.

And afterwards, to wit, on the thirtieth day of April, A. D. 1857, the same being one of the days of the April term of said supreme court, A. D. 1857, the following proceedings were had in the foregoing entitled cause, and entered of record in said supreme court, which said proceedings are in the words and figures following, to wit:

DICKINSON B. MOREHOUSE
vs.
WILLIAM A. PHELPS. } Appeal from Jo Daviess.

This day came the said appellant, by Blackwell, his counsel, and suggested that the said record has been diminished, and moved the court that a writ of certiorari be awarded herein; and it appearing to the court that in said record there is a diminution, it is, therefore, considered by the court that a writ of certiorari be awarded herein.

And afterwards, to wit, on the thirtieth day of April, A. D. 1857, a writ of certiorari was issued from said supreme court, directed to the clerk of the circuit court of Jo Daviess county, State of Illinois, which said writ is in the words and figures following, to wit:

STATE OF ILLINOIS, *ss:*

Supreme court, third grand division, at Ottowa.

The people of the State of Illinois to the clerk of the circuit court of Jo Daviess county, greeting:

Whereas, in a certain plea between William A. Phelps, plaintiff, and Dickinson B. Morehouse and Bradner Smith, defendants, lately depending in the circuit court of said county, wherein judgment was rendered for the said plaintiffs and against the said defendants; and the said defendant, Morehouse, having appealed from the judgment of said court, rendered against him as aforesaid, to the supreme court held at Ottowa, on the 1st Tuesday after the 3d Monday in April, A. D. 1857, and in pursuance of the said a transcript of the record and proceedings in the plea aforesaid was transmitted:

And also, whereas it has been suggested, on the part of said Morehouse, that the said record has been diminished, inasmuch as the original plat of the town of Galena hath not been sent up; and

forasmuch as the said supreme court are not satisfied that there is a sufficient record sent in the plea aforesaid, but in the record there is a diminution; you are, therefore, hereby commanded that, without delay, the said plat therein you cause to be transmitted to the supreme court (now in session at Ottawa) instanter, without any diminution or addition whatsoever, to the end that speedy justice may be done in the premises according to law; whereof you are in nowise to fail, and send you then and there this writ.

Witness the Hon. Walter B. Scates, chief justice of said court, [SEAL.] and the seal thereof at Ottawa, this 30th day of April, in the year of our Lord one thousand eight hundred and fifty-seven.

L. LELAND,
*Clerk of the Supreme Court.*
By J. B. RICE, *Deputy*.

And afterwards, to wit, on the first day of May, at the April term, A. D. 1857, of said supreme court within and for the third grand division of the State of Illinois, in the record and proceedings thereof in the foregoing entitled cause appears of record the following entry, to wit:

FRIDAY, *May* 1*st*, 1857.

DICKINSON B. MOREHOUSE
vs.
WILLIAM A. PHELPS. } Appeal from Jo Daviess.

This day this cause taken up by agreement of the parties herein; and Washburne, appellant's counsel, commenced the argument of this cause on the part of said appellant. Previous to the argument of this cause the said parties, by their counsel, agreed that the return of the said writ of certiorari, awarded and issued herein, be filed as a part of the record of this cause, when the same shall be received.

And afterwards, to wit, on the second day of May, at the April term, A. D. 1857, of said supreme court, in the record and proceedings thereof in the above-entitled cause appears of record the following entry, to wit:

SATURDAY, *May* 2*d*, 1857.

DICKINSON B. MOREHOUSE
vs.
WILLIAM A. PHELPS. } Appeal from Jo Daviess.

This day the argument of this cause was continued and concluded by Johnson for appellee, and by Blackwell for appellant; and the court not being sufficiently advised of and concerning the premises took time to consider.

Afterwards, to wit, on the ninth day of May, A. D. 1857, the same being one of the days of the April term, A. D. 1857, of said supreme court, the return of the clerk of the circuit court in and for Jo Daviess county, State of Illinois, to said writ of certiorari was received and filed with the record in this cause, which said return is in the map, words, and figures following, to wit:

(Here follows map, page 132.)

Annexed to the original map or plat of the town of Galena, in said return contained, a copy of which plat is above appended to this transcript as a part thereof, are the certificates of the county surveyor and clerk of the circuit court of Jo Daviess county, State of Illinois, and the writ of certiorari issued herein; which said certificates and writ of certiorari are in the words and figures following, to wit:

The certificate of the county surveyor of said Jo Daviess county, annexed to said plat as aforesaid, is in the words and figures following, to wit:

I, Charles R. Bennett, surveyor of the town of Galena, by appointment from the commissioners *appointment from the commissioners* appointed under the act of Congress of the 2d July, 1836, for the survey of the town of Galena, &c., and county surveyor of the county of Jo Daviess, State of Illinois, do hereby certify the above to be a correct diagram of the survey of the town of Galena, embracing 640 , situated on both sides of Fevre river, and on the east and west sides of the 4th principal meridian; the corner of sections 24 and 13, township 28 north, range 1 west of the said 4th principal meridian, being near the centre of the town, as will appear by reference to the above plat. The course of the streets and the width of the same are denoted correctly in letters and figures, also the size of each lot. The lots on some of the streets are numbered from one upward. Some part of the town is numbered by block, and the lots in each block numbered from one upwards.

Galena, March 28, 1838.

CHARLES R. BENNETT,
*Su'r Town of Galena and County of Jo Daviess.*

Recorded this eighteenth day of February, A. D. 1842.
JEREMIAH BETTIS, *Recorder.*

The certificate of the clerk of the circuit court of Jo Daviess county, Illinois, annexed to said plat as aforesaid, is in the words and figures following, to wit:

STATE OF ILLINOIS,
*Jo Daviess County, ss.*

I, Wm. R. Rowley, clerk of the circuit court, and ex-officio

recorder in and for said county, in the State aforesaid, hereby certify the annexed plat to be a true and correct copy of the original plat of the town of Galena, as the same appears of record in my office, in book "F" of deeds, page 65.

In testimony whereof, I have hereuntò set my name, and affixed [SEAL.] the seal of said court, at my office, in Galena, this 4th day of May, A. D. 1857.

Attest:

WM R. ROWLEY, *Clerk.*

The said writ of certiorari annexed to said plat as aforesaid is in the words and figures following, to wit:

STATE OF ILLINOIS, *ss.*

Supreme Court, Third Grand Division, Ottawa.

The people of the State of Illinois to the clerk of the circuit court of Jo Daviess county, greeting:

Whereas in a certain plea between William A. Phelps, plaintiff, and Dickenson B. Morehouse and Bradner Smith, defendants, lately depending in the circuit court of said county, wherein judgment was rendered for said plaintiffs, and against the said defendants; and the said defendant, Morehouse, having appealed from the judgment of said court, rendered against him as aforesaid, to the supreme court held at Ottawa on the first Tuesday after the third Monday in ; and in pursuance of the said appeal, a transcript of the record, and the proceedings in the plea aforesaid, was transmitted. And, also, whereas it hath been suggested, on the part of said Morehouse, that the record has been diminished, inasmuch as the original plat of the town of Galena hath not been sent up; and forasmuch as the said supreme court are not satisfied that there is a sufficient record sent in the plea aforesaid, but in the record there is a diminution, you are therefore hereby commanded, that without delay the said plat therein you cause to be transmitted to the supreme court (now in session at Ottawa) instanter, without any diminution or addition whatsoever, to the end that speedy justice may be done in the premises, according to law; whereof you are in no wise to fail; and send you then and there this writ.

Witness the Hon. Walter B. Scates, chief justice of said court, [SEAL.] and the seal thereof, at Ottawa, this 30th day of April, in the year of our Lord one thousand eight hundred and fifty-seven.

L. LELAND,
*Clerk of the Supreme Court.*
By J. B. RICE,
*Deputy.*

Said writ of certiorari is endorsed as follows, to wit:

I herewith return the within writ, accompanied with the original plat of the town of Galena, as I am within commanded.

WM. R. ROWLEY,
*Clerk Jo Daviess County Cir. Court.*

The said return to said writ of certiorari is endorsed as follows, to wit:

"Filed May 9, 1857." L. Leland, clerk.

And afterwards, to wit, on the thirtieth day of May, A. D. 1857, the same being one of the days of the April term, A. D. 1857, of said supreme court within and for the third grand division of the State of Illinois, the following proceedings were had by said supreme court in the foregoing entitled cause, and entered of record in said supreme court; which said proceedings are in the words and figures following, to wit:

SATURDAY, *May* 30, 1857.

DICKENSON B. MOREHOUSE
vs.
WILLIAM A. PHELPS.
} Appeal from Jo Daviess.

On this day came again the said parties, and the court having diligently examined as well the record and proceedings aforesaid as the said matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that that record is no error; therefore it is considered by the court that judgment aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the court that the said appellee recover of and from the said appellant his costs by him in this behalf expended, and that he have execution therefor.

*Opinion of the Court by Caton, Justice.*

This is the same case which was before us in 15th Ill. R. 572, under the title of Phelps and Smith, and it is brought here again as the only channel through which it may be taken to the Supreme Court of the United States, whose prerogative it is to give a final and authoritative construction to all acts of Congress.

If we have misconstrued the meaning of the words "legal representatives" as used in the acts of Congress under consideration, it will afford us pleasure to be set right by that court, and we shall be happy to afford every facility for taking the case to that tribunal.

Although the case has been elaborately argued, and has been carefully reviewed by this court, we have been unable to arrive at any other conclusion than that expressed when the case was formerly before us. In expressing the views of this court on that occasion, I said, "Nothing can be more clear to my mind than that the term 'legal representatives' as used in this law was designed to describe a party in interest whose identity was uncertain, and that by that description it was designed to designate the person or party who had succeeded to the right of the deceased, and by virtue of which right alone the law of Congress authorizes the land to be entered.

"It was the design of the law that no one should be permitted to enter the land except the party who had received the permit, or had made the improvement, or one who had in some legal mode succeeded to the right of such party. If any others were allowed to enter it, it was a fraud upon the law. Such is the undoubted meaning of the act of Congress; and it is equally clear that the phrase 'legal representative' must receive the same construction, when used in the judgment or certificate of the commissioners, and in the patent issued thereon. It may be true that the commissioners had the right to award the pre-emption to a particular person by name, as the legal representative of Guyard, and that, had the patent issued to such person by name, it would have been conclusive, at least in a court of law, although another might be able to show that he was in fact the true legal representative.

"Indeed, the presumption must be, that when it was satisfactorily shown who was, in truth, the legal representative of the deceased, the certificate would be granted directly to such person. And whenever the more descriptive term 'legal representative' was used, it shows that the commissioners were in doubt as to who, in truth, held the right which had once existed in the deceased, or at least that they did not choose to determine that question, but rather chose to leave it open, to be determined by further investigation by courts at law. And such, indeed, was the only prudent course for the commissioners to pursue; for it was well known then, as it is manifest now, that claims were likely to be preferred and prosecuted by those who would apparently succeed to the rights of the deceased, as the heirs, executors, or administrators, in total ignorance of the fact that the deceased had in his lifetime granted away to others the very rights which they were claiming to exercise. Although the commissioners may have supposed, and Morehouse himself may have believed, that he, as administrator, was, in truth, the legal representative of Guyard, as respects this right of pre-emption, yet if he was, in truth, not such legal representative, such supposition or belief could not change the fact or the law, and make him the legal representative, and enable him, in truth, a stranger, to take the grant by such designation.

"Suppose the law had authorized it, and the certificate had been

given, and the patent issued to the heirs at law of Guyard, would proof that any stranger had appeared before the commissioners and prosecuted the claim, as heir, enable him to take the grant by that designation, simply because the commissioners supposed he was the heir, and, as such, was entitled to the right?

"It is the patent which grants the land, and that was the act of the government and not of the commissioners; and we cannot presume that the government had any intent in issuing the patent beyond that which is expressed on its face.

"The grantee is not named, but is described in the patent; and he, and he alone, who bears and can maintain that description, can take by the grant. The grant is to the 'legal representatives of Robert P. Guyard,' and it would be strange indeed if the one who is such representative should not be allowed to take the thing granted, but that it should go to one who, as a matter of law and of fact, is not the legal representative to whom the conveyance runs."

The fact that Morehouse was the administrator of Guyard, and that he presented the claim before the commissioners and got the pre-emption allowed, and subsequently made the entry and paid the purchase-money at the land office, has been urged upon the present argument with peculiar emphasis, as showing that he alone was meant in the certificate of the commissioners and in the patent by the descriptive designation of "legal representative of Robert P. Guyard."

To our comprehension, this position has been satisfactorily answered by what has been already quoted. We take it to be a matter at this day not open to controversy, that whoever succeeded to the right of Guyard, as the original settler, either by operation of law or by grant, is his legal representative, within the meaning of the act of Congress, and consequently within the meaning of the certificate of the commissioners and of the patent, for the expression must have the same meaning in each.

Now, if Phelps was the grantee of Guyard, and, as such, was the legal representative, the right was as absolutely vested in him as if he had been the original settler; and there was no right left in Guyard which could descend to his heirs or pass to his administrator, any more than as if he had not been the original settler, but had always been a stranger to it.

If his grant to Phelps divested him of his right of pre-emption, and conferred it upon his grantee, there was nothing left which could go to his heirs or administrator. They could acquire no right upon his death, for he had none at that time.

Nothing but the decision of the highest tribunal in the government can convince me that something can be made out of nothing; that a right could be acquired where none existed.

To my mind, it is a question which will not bear argument, that Morehouse was not the legal representative of Guyard as to this pre-

emption right, but that Phelps was. Indeed, that has not been controverted during the whole course of the argument, except so far as objection was taken to the deed from Guyard to Phelps, for the want of an expressed consideration, and which we do not think is tenable.

Holding that deed to be good—and no right could pass to Morehouse, as the legal representative of Guyard, for none existed in his intestate; and still he was not an intermeddler without right in the claim which he presented and prosecuted before the commissioners—he was an undisputed owner, in his own right, of one undivided half of the pre-emption right; and in establishing his own right, he necessarily and unavoidably also established the right of the owner of the other undivided half, whoever he might be.

His appearance before the commissioners, and prosecution of the claim, and subsequent entry of the land, in the name of himself and of the legal representatives of Guyard, was perfectly consistent with his true position and the rights of Phelps, who was that legal representative.

Indeed, the language of the certificate and of the patent is inconsistent with the claim now set up by Morehouse, that he was intended as the sole pre-emptor and grantee. It is "to the legal representatives," &c.—in the plural. Had it been the intention of the commissioners to award the right and of the government to grant this half of the land to him, as the sole representative of Guyard, he would have been described in the singular and not in the plural number, as was done in both cases.

We must understand that he appeared and acted only in that capacity which was consistent with the integrity of his position, and not presume that he intended to perpetrate a fraud upon the government, by obtaining a pre-emption and grant to himself, if he was not entitled to it, and upon the true representative of Guyard, if he himself did not occupy that relation. Although he himself and the government may all have supposed and thought it probable that he was the true representative, and, by the description of the grantee, adapted as such, would take under the grant, yet that was not certainly known to be the case. The only prudent and just course, was so to word the grant that the true representative should take, though he might be another than Morehouse.

The position contended for, that the individual, whoever he might be, who appeared before the commissioners and claimed to be the legal representative, must be held to be the grantee by that designation, would require us to give the land to any stranger who might, in fraud of the government and of the true owner of the right, appear, and, by false pretences, impose himself upon the commissioners and the government as such; and it would frustrate the manifest and prudential object of both, in awarding the right and in granting the land to the party or parties by designation, instead of by names—a course capable of preventing, and undoubtedly designed to prevent, the possibility of imposition or mistake.

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Had Phelps appeared before the commissioners as the representative of Guyard, and proved his deed under which he claims the right, and the certificate and patent had been issued in the precise terms which were employed, then, by the very terms of the argument now attempted to be answered, he would have taken under the descriptive terms used to designate the grantee. In that case, he would have been no more the legal representative than he now is, and would no more have answered the description in the patent expressed. It is the conveyance by Guyard to him of the right which gives him the character of representative. What! are courts to recognize the mere claims of right, in preference to the actual existence of a right established by legal proofs? I trust it will be long before such a principle meets a sanction in a court of justice; long before so wide a door is thrown open to invite the entrance of fraud and imposition—glaring fraud upon the rights of absent parties, and gross imposition upon the just intentions of the government. This case must establish a principle the consequences and operation of which must reach far beyond this case. We find no error in the decisions of the circuit court. I have intentionally abstained from discussing minor questions, which the affirmance of the judgment must necessarily decide against the appellant—preferring to confine the opinion to the construction of the act of Congress and the language used in the patent issued under it, that our judgment may be reviewed unembarrassed by any question of jurisdiction.

The judgment of the circuit court must be affirmed.

Be it remembered that afterwards, to wit, on the thirtieth day of May, A. D. 1857, the same being one of the days of the April term of said supreme court, A. D. 1857, Morehouse, the appellant aforesaid, by his counsel, filed in the clerk's office of said supreme court his petition, which petition is in the words and figures following, to wit:

Appeal from the circuit court of Jo Daviess county, Illinois, to supreme court of said State, April term, 1857.

DICKINSON B. MOREHOUSE, appellant,
vs.
WILLIAM A. PHELPS, appellee.
} Ejectment.

To the honorable the supreme court of the State of Illinois, or the honorable Walter B. Scates, chief justice thereof.

Your petitioner, Dickinson B. Morehouse, the appellant in the above-entitled cause, represents that the said supreme court has rendered a final judgment in the said cause, and that in the decision thereof by the said supreme court of the said State of Illinois,

which is the highest court in which a decision can be had in said State, there was drawn in question the construction of two certain acts of the Congress of the United States, to wit: an act entitled "An act authorizing the laying off a town on Bean river in the State of Illinois, and for other purposes," approved February 5, 1829; also an act entitled "An act to amend an act entitled an act authorizing the laying off a town on Bean river, in the State of Illinois, and for other purposes, approved February 5, 1829," approved July 2, 1836:

And your petitioner further represents, that the decision of the said supreme court of the said State of Illinois, in the said cause, was adverse to the right and title claimed by your petitioner, as appears of record;—he therefore prays that it may be certified in this case, that in the decision thereof there is drawn in question the construction of the statutes above described, in order that the case may be removed to the Supreme Court of the United States.

DICKENSON B. MOREHOUSE,
*By his Attorney*,
E. B. WASHBURNE.

Endorsed: "Filed May 30, 1857." "L. Leland, clerk."

Be it remembered that afterwards, to wit, on the thirtieth day of May, A. D. 1857, the same being one of the days of the April term of said supreme court, the following order was made by said supreme court and entered upon the records of said court, which said order is in the words and figures following, to wit:

Appeal from the circuit court of Jo Daviess county, Illinois, to supreme court of said State, to April term, 1857.

DICKENSON B. MOREHOUSE
vs.
WILLIAM A. PHELPS.

SATURDAY, *May* 30, 1857.

It is ordered by the court that it be certified in this case that there was drawn in question the construction of two certain acts of Congress of the United States, to wit: an act entitled "An act authorizing the laying off a town on Bean river, in the State of Illinois, and for other purposes," approved February 5, 1829; and also an act entitled "An act to amend an act entitled an act authorizing the laying off a town on Bean river, in the State of Illinois, and for other purposes, approved February 5, 1829," approved July 2, 1836; and that the decision of the said court was adverse to the right and title thereby set up and claimed by the said appellant, Dickenson B. Morehouse, under the said statutes of the United States.

And afterwards, to wit, on the thirtieth day of May, A. D. 1857, Morehouse, the appellant aforesaid, filed in the clerk's office of said supreme court his bond, which bond is in the words and figures *and* following, to wit:

Know all men by these presents, that we, Dickenson B. Morehouse and Charles S. Hempstead, are held and firmly bound unto William A. Phelps in the full and just sum of one thousand dollars to be paid to the said William A. Phelps' certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 30th day of May, in the year of our Lord one thousand eight hundred and fifty-seven.

Whereas lately, at a term of the supreme court of the State of Illinois, in a suit depending in said court between Dickenson B. Morehouse and William A. Phelps, was rendered against the said Dickenson B. Morehouse for costs, and affirming the judgment of the circuit court of Jo Daviess county, Illinois; and the said Dickenson B. Morehouse having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said William A. Phelps citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now the condition of the above obligation is such, that if the said Dickenson B. Morehouse shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

CHARLES S. HEMPSTEAD, [SEAL.]
D. B. MOREHOUSE, [SEAL.]

Sealed and delivered in presence of—
THOS. D. CONNOR.

Approved by W. B. SCATES,
*Ch. Justice, Illinois.*

Endorsed: "Filed May 30, 1857. L. Leland, clerk."

STATE OF ILLINOIS, *ss.*

Supreme Court within and for the Third Grand Division of said State.

DICKENSON B. MOREHOUSE
vs.
WILLIAM A. PHELPS.
} Appeal from Jo Daviess.

I, Lorenzo Leland, clerk of said supreme court, do hereby cer-

tify that the foregoing is a full, true, and complete copy of the record and files of said supreme court, and of all the papers, exhibits, depositions, and of all the proceedings had by said supreme court in the above-entitled cause, wherein Dickenson B. Morehouse is appellant, and William A. Phelps appellee, as the same appears on the record and files of said supreme court in my office.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said supreme court, at Ottawa, this twenty-fifth day of November, A. D. 1857.

[SEAL.]

L. LELAND,
*Clerk of said Supreme Court.*

| | |
|---|---|
| Clerk's fee for transcript | $78 25 |
| Certif. and seal | 50 |
| Am't | $78 75 |

UNITED STATES OF AMERICA, *ss:*

The United States of America to the honorable the judges of the supreme court within and for the State of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Illinois, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Dickinson B. Morehouse, appellant, and William A. Phelps, defendant in appeal, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damages of the said Dickinson B. Morehouse, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme

Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Roger B. Taney, Chief Justice of the said Supreme Court, the thirtieth of May, in the year of our Lord one thousand eight hundred and fifty-seven.

[SEAL.] WILLIAM H. BRADLEY,
*Clerk of the Circuit Court of the United States for Northern District of Illinois.*

Allowed by

[Endorsed:] Dickenson B. Morehouse vs. Wm. A. Phelps. Writ of error.

The United States of America to William A. Phelps, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the United States, wherein Dickerson B. Morehouse is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Walter B. Scates, ch. justice of the supreme court of the State of Illinois, this thirtieth day of May, in the year of our Lord one thousand eight hundred and fifty-seven.

WALTER B. SCATES,
*Ch. Justice of the State of Illinois.*

THE STATE OF OHIO,
*Fayette County, ss.*

On this thirteenth day of October, in the year of our Lord one thousand eight hundred and fifty-seven, personally appeared James Stout, constable, before me, the subscriber, a justice of the peace in and for said county, and makes oath that he delivered a true copy of the within citation to William A. Phelps on the 13th day of October, A. D. 1857.

JAS. STOUT, *Constable.*

Sworn to and subscribed before me this day and year aforesaid.
J. W. BLIZARD, *J. P.*

| | |
|---|---|
| Constable's fees | $0 50 |
| Justice's fees | 0 25 |
| | 0 75 |